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Reservations and Interpretative Declarations to Multilateral Treaties

Frank Horn

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RESERVATIONS AND INTERPRETATIVE DECLARATIONS
TO MULTILATERAL TREATIES

To Ingeborg, Elisabeth and Rolf

**T.M.C. ASSER INSTITUUT
THE HAGUE – THE NETHERLANDS**

Reservations and Interpretative Declarations to Multilateral Treaties

by

Frank Horn

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Abstract:

States restrict their commitment to treaty obligations by means of reservations. The objective of this thesis is to clarify the concept of reservation in order to facilitate the implementation of the reservation regime under the Vienna Convention on the Law of Treaties. Article 2 of the Vienna Convention is not sufficiently clear when it states that a reservation "excludes or modifies the legal effect of certain provisions under the treaty".

The legal effects of a reservation are determined on the basis of their acceptance or rejection. An acceptance modifies the relevant treaty norm for the reserving state. According to the so-called principle of reciprocity a reservation operates also to the benefit of the accepting state. Although this principle is formulated in categorical terms it will not be applicable in a number of situations. An objection prevents the relevant treaty norm from applying between the reserving and the objecting state. The contention that objections seem to be void of significance in the case of 'excluding reservations' is disquieting as most reservations belong to this category. The right to make objections had been stipulated in order to protect the interests of states confronted with reservations they are not ready to accept.

In order to construe the reservation rules as a meaningful legal institution, reservations may be conceived as affecting treaty norms in a special way. According to the view of Hohfeld norms may be considered as introducing correlate legal relationships. An 'excluding reservation' will introduce the opposite norm (contraregulation). An objection to such a reservation would exempt the subject-matter from treaty regulation (deregulation). This construction operates moderately well with respect to 'mutual' norms; on a limited scale with respect to 'absolute' norms as found in human rights treaties; but not at all with respect to 'remedial' norms stipulating compulsory disputes settlement. An objection may however be qualified so as to prevent parts or all, of the treaty from applying where a confronted state is unable to accept the exclusion of compulsory disputes settlement.

Reservations are considered as accepted by states not having objected. A distinction between reservations and interpretative declarations is inevitable because the rule of tacit acceptance does not apply to declarations short of reservation. Such declarations only become binding where the confronted states have acquiesced in them. Acquiescence is not as easy to establish as tacit acceptance under article 20(5) of the Vienna Convention. A declaring state has to prove acquiescence in its declaration. A reserving state may just invoke the inaction by another party. Here the burden of proof rests on the non-reacting state which has to provide evidence against the presumption of acceptance of the reservation. A crucial problem is to determine which rules will apply when there are doubts as to the nature of a statement. State practice does not give any guidance in this matter. Recent legal cases have invoked the subjective criterion of conditionality. If a statement is a clear condition for participation in the treaty it amounts to a true reservation. This view gives rise to certain difficulties. An equitable solution of the problem requires that the views of both the declaring state and the confronted states is taken into consideration. The concern for the effective operation of treaty norms as well as their consensual basis favours the presumption for interpretative declarations in uncertain cases.

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The T.M.C. Asser Instituut was founded in 1965 by the Dutch universities offering courses in international law to promote education and research in the fields of law covered by the departments of the Institute: Private International Law, Public International Law, including the Law of International Organisations, Law of the European Communities and International Commercial Arbitrations. The Institute discharges this task by the establishment and management of documentation and research projects, in some instances in co-operation with non-Dutch or international organisations, by the dissemination of information deriving therefrom and by publication of monographs and series.

PREFACE

A reader holding this voluminous study in his hands may perhaps wonder whether the question of reservation to treaties really deserves so much attention. Indeed, some arguments may suggest that the whole question is but a marginal one. A computation made several years ago showed that the occurrence of reservations in the first post-war quarter of a century was 0.85 reservation per multilateral treaty (cf. Gamble, *Reservations to Multilateral Treaties*, 74 AJIL 1980, p. 392). This figure may perhaps vary depending on the method of computation adopted, but it will certainly remain insignificant anyway. In a similar vein it is sometimes observed that reservations, on the whole, do not affect the regulatory impact of a multilateral treaty. These arguments may be correct as far as they go but this is not very far.

First of all, it must be noted that average statistical figures do not reflect the possible importance or gravity of problems whenever they arise; and reservations (sometimes of considerable weight) are attached to a great number of treaty provisions. Furthermore, insofar as multilateral treaties form a network of bilateral relations, every reservation – whether accepted or objected to – modifies in one way or another the scope of obligations of the reserving State vis-à-vis each other party to a treaty. Thus, reservations may be quite decisive for bilateral relations under a multilateral treaty. But the impact of reservations is not limited to their bilateral aspects. The fact that treaties relatively often prohibit reservations, wholly or partly, testifies to the awareness that reservations can adversely affect the regulatory régime established by a multilateral treaty, as a whole. This awareness is further emphasized in the Vienna Convention on the Law of Treaties by the recognition that even when a treaty is silent on the question of reservations, reservations can be incompatible with the very object and purpose of a treaty, and consequently inadmissible (Art. 19/c).

It is thus by no means a marginal question that is addressed in this book. Its importance is, indeed, growing – as the body of multilateral treaties grows and as the number of negotiating parties increases. And a number of “legal niceties”, as e.g. the question of distinction between reservations on the one hand, and interpretative or other declarations on the other hand, further add to the complexity of the issues involved.

Reservations to multilateral treaties have been much of a problem ever since the turn of the century, although occasionally they occurred even earlier. The regulation of reservations has never been quite uniform. While the requirement of unanimous acceptance of reservations as the condition of their admissibility and of the participation of the reserving State in a treaty had prevailed until the early post-war years, States of the Western Hemisphere adhered to a more liberal régime of reservations already in the inter-war period; and certain international organisations, like e.g. UPU or ITU developed their peculiar régimes

of reservations still earlier (Council of Europe is an important post-war addition to this category of international organisations). Reservations to the Genocide Convention and the advisory opinion of the ICJ on this question have initiated the process of reassessment of the rule of unanimity, which resulted in the adoption of a flexible régime of reservations in the Vienna Convention on the Law of Treaties.

The "standard" régime of reservations, provided for in the Convention has formally not been intended to be all-embracing. In respect of certain categories of multilateral treaties the Convention has retained the rule of unanimity (Art. 20, para. 2). The Convention is also "without prejudice to any relevant rules" pertaining to treaties adopted within international organisations, and thus recognizes their respective special régimes of reservations (Art. 5). Several hundreds of multilateral treaties (true enough, almost all of them of regional or rather technical character) would thus, anyway, fall outside the field of applicability of the "standard" conventional provisions on reservations – even apart from the question of their formal applicability *ratione personae* and *ratione temporis* according to Art. 4 of the Convention.

As is known, this article also raises the question of relationship between the conventional and customary rules of the law of treaties, i.e. including the rules on reservations. According to some views the conventional rules in general, by the very process of their prolonged meticulous elaboration and their subsequent formal adoption by an overwhelming majority of participating States, have become *the* rules of customary law which applies independently of the Convention. According to other views the rules concerning reservations belong just to that category of conventional provisions which, at least at the moment of their adoption, could not be regarded as a mere reflection or codification of the customary law on the subject. This position of course leaves open the possibility that the conventional rules on reservations may *tractu temporis* develop into rules of customary international law, through the process recognized in Art. 38 of the Convention.

Now, without attempting to delineate here the exact scope of binding force and applicability of the conventional rules on reservations at the present moment, one can safely say, having in mind the experience of the past 18 years, that the conventional régime of reservations, which forms the main basis of this study, has won much broader acceptance than that which follows from the formal provision of Art. 4 and from the number of States-Parties to the Convention.

It is no wonder that the intricate issues – both legal and political – involved in the question of reservations, for which there were apparently no ready or sufficiently analogous solutions to be borrowed from municipal legal systems, have soon attracted the attention of writers in international law. At least since 1919 the flow of special literature on reservations has been almost continuous; and the total volume of the literature on reservations, i.e. including the relevant passages in writings on related subjects and on the law of treaties in general, is really overwhelming. At the same time the number of monographs on the subject is much less impressive. Moreover, four of them are of some vintage and their value is mostly historical. Some others are limited in scope to certain categories of treaties or of reservations; or, authoritative as they are, offer a

more summary view of the subject. Furthermore, strange as it may look, all the monographs published after 1919, except for three courses at the Hague Academy (the latest one from 1975: Ruda, *Reservations to Treaties*, RCADI, vol. 146, pp. 96–218) are in languages other than English. Finally, an observer will note that writings on reservations have markedly decreased in number since the middle of 1970s, and since the publication of the latest monograph on the subject in 1979 (Imbert, *Les réserves aux traités multilatéraux*, 503 p.) the special writings on reservations have become extremely scarce. One gets an impression that other areas of international law, as i.a. the law of the sea, environmental law, human rights, have recently attracted the main attention of writers in international law. But the law of treaties in general, and the question of reservations in particular, has by no means decreased in importance thereby. With this in mind, the study by Dr. Horn is to be welcomed as a strong and timely reminder of the problem and, indeed, as the first detailed study of the subject in English.

The book by Dr. Horn was defended, in manuscript, as a doctor's thesis at the Faculty of Law, University of Uppsala, in the Spring of 1986. The Author approaches the object of his research against the broad background of legal theory and of general concepts of legal norms. Legal effects of reservations and, especially, of objections to reservations, are also considered in relation to those general theories and concepts. There may be reasons for reflections upon this approach. Yet, whatever might be said of marriages between general legal theories which develop mostly on the basis of experience derived from national legal systems, and international law which develops as an autonomous and predominantly pragmatic discipline (even if "general principles of law" are recognized as its part, and many of its constructions are borrowed from national legal systems), the book by Dr. Horn is thought-provoking and persuasive in many respects. It is also to be appreciated for the scope and thoroughness of the legal analysis.

Uppsala, July 1987

Jerzy Sztucki
Professor of International Law
University of Uppsala

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Preparing a doctoral thesis amounts to an agonizing childbirth that goes on not only for hours and days but for years. Numerous are the persons who are acting midwife. Their faces appear and disappear in the blaze of convulsions of labour. Not all of them are recalled the moment the newborn thesis faces the glaring light of scholastic world. Nonetheless the help and support of all has been vital to the process and naturally my gratitude will embrace all of them.

The work at hand has been presented as a doctoral thesis in the Faculty of Law at the University of Uppsala. I wish to give my thanks to the Faculty for having received me and helped me to bring my research to a happy ending.

I am greatly obliged to Bengt Broms, Professor of Public International Law and Constitutional Law at the University of Helsinki for having encouraged me to proceed on the adventurous path of academic investigation. I remember with pleasure the amity and help I have experienced from my former assistant colleagues at the Helsinki Law Faculty, Kari Hakapää, now Professor of Public Law at the University of Lappland, Rovaniemi, Erkki Kourula, presently Counsellor at the Finnish Foreign Ministry and Lauri Hannikainen, Acting Assistant Professor of Public International Law at the University of Helsinki, with all of whom I have had the privilege and pleasure to work and exchange views during a decisive period of my life. My supervisors in Uppsala have been Atle Grahl-Madsen, presently Professor of Public International Law at the University of Bergen, Göran Melander, Docent in Public International Law at the Law Faculty in Lund and Jerzy Sztucki, Professor of Public International Law in Uppsala. To all of them I want to express my profound thankfulness. The admirable zeal with which Professor Sztucki dug into my manuscript and the long and interesting discussions we had together were of considerable value for the very moment I officially had to defend my thesis. Nils Jareborg, Dean of the Law Faculty at Uppsala has read the manuscript and in his gentle way hinted both discrete and constructive criticism. To him I wish to render my very special thanks. I also wish to manifest my gratefulness to Professor Emeritus Alvar Nelson and his wife Kirsten Nelson. Their refined home has been a warm and generous haven for faraway and less faraway academics. They have largely helped me to make my sojourn in Uppsala a pleasant one. Within the community of postgraduate students of Public International Law I have found a number of new friends. With Eyassu Gayim, Maja Eriksson, Homayoon Moussavian and Gunnel Stenberg I have had many rewarding and fruitful discussions on basic problems of International Law. I am also thankful to Per Sjögren, former Amanuensis in International Law in Uppsala now Legal Counsellor at the Swedish Department of Foreign Affairs, for the help I have so richly enjoyed.

Throughout my research trips I have been well received by experts and officials whom I approached. The information I have obtained has been funda-



mental to my work. I am deeply indebted to all of them. To Jean-Pierre Imbert, Professor of Public International Law at the University of Caen, I owe a profound gratitude. It was a pleasure to profit from his knowledge of and experience in reservation law. His thesis on reservations remains a major contribution to treaty law. I hope that my work does not amount to an unnecessary duplication. Reservations constitute such a complex matter and new aspects are regularly revealed. There will probably never be a final word on this topic. The sole hazard is that the question of reservations may become obsolete. However present state practice shows that this will not happen in the foreseeable future.

My stay at the OAS General Secretariat proved to be a rewarding one. The information and guidance I got there especially from Treaty Officer Eliana P. Vela, was priceless. I wish to address my warmest thanks to her. Similarly my stay at the Treaty Section of the UN General Secretariat was of primary importance to my work. I had here the chance to penetrate thoroughly into reservation practice with respect to treaties deposited with the United Nations. In this connection I want to express my special thanks to the Chief of the Treaty Section, Max Léwy and to former Associate Legal Officer Julio Baez.

At the various libraries that I have visited assistance has been efficient and courteous. I have greatly profited from the services of the Library of Parliament in Helsinki, the Library of the Swedish Institute of International Law (SIFIR) where the Librarian Rafal Lekach has provided formidable help, the Carolina Rediviva and Dag Hammarskjöld libraries in Uppsala, the Library of the Swedish Foreign Department as well as its UN Archives, the Library of Congress in Washington and last but not least the Library of the OAS in Washington with the benevolent support of Jorge Grassman.

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ABBREVIATIONS

AFDI	Annuaire français de droit international
AJIA	Annuario Juridico Interamericano
AJIL	American Journal of International Law
AJS	American Journal of Sociology
ALI	American Law Institute
Annuaire IDI	Annuaire de l'Institut de droit international
ASDI	Annuaire Suisse de droit international (see SZIR)
Bevans	Treaties and Other International Agreements of the United States of America 1776–1949, compiled under the direction of Charles I. Bevans
BFSP	British and Foreign State Papers
BYIL	British Yearbook of International Law
CCPR	Human Rights Committee
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Covenant on Economic, Social and Cultural Rights
CICR	Comité international de la Croix Rouge
CPCR	Covenant on Political and Civil Rights
CWh	Committee of the Whole
CYIL	Canadian Yearbook of International Law
Doc.	Document
DoS	Department of State
DSB	Department of State Bulletin
DÖV	Die Öffentliche Verwaltung
ECA	European Conventions and Agreements
ECHR	European Human Rights Convention
ETS	European Treaties and Conventions
Eur. Com. H.R.	European Commission of Human Rights
Eur. Court H.R.	European Court of Human Rights
FAO	Food and Agriculture Organization of the United Nations
GATT	General Agreement on Tariffs and Trade
HLR	Harvard Law Review
HRJ	Human Rights Journal
HRR	Human Rights Review
GYIL	German Yearbook of International Law
IACJ	Inter-American Council of Jurists
I.A. Court H.R.	Inter-American Court of Human Rights
IATC	Inter-American Treaties and Conventions, Signatures, ratifications with explanatory notes, OASTS No. 9, 1985
IAYBHR	Inter-American Yearbook on Human Rights
ICAO	International Civil Aviation Organization

ICJ	International Court of Justice
ICJ Reports	Reports of Judgements, Advisory Opinions and Orders of the International Court of Justice
ICLQ	International and Comparative Law Quarterly
IJIL	Indian Journal of International Law
ILCYB	Yearbook of the International Law Commission
ILM	International Legal Materials
ILO	International Labour Organization
IMCO	Inter-Governmental Maritime Consultative Organization
IMO	International Maritime Organization (since 1982)
IRO	International Refugees Organization
IRRC	International Review of the Red Cross
ILR	International Law Reports
ItJIL	Italian Journal of International Law
ITU	International Telecommunication Union
JDI	Journal du droit international
JJIL	Japanese Journal of International Law
KJIL	Korean Journal of International Law
LOS	Law of the Sea
LNTS	League of Nations Treaty Series
MT	Multilateral Treaties Deposited with the Secretary General
NILR	Netherlands International Law Review
NOU	Norges offentlige utredninger (Norwegian Official Reports)
NTIR	Nederlands Tijdschrift voor Internationaal Recht
NYUJIL	New York University Journal of International Law
OAS	Organization of American States
OASTS	Treaty Series of the OAS
OR	Official Records
PAU	Pan American Union
PCIJ	Permanent Court of International Justice
Pleadings	International Court of Justice: Pleadings, Oral Arguments, Documents
PIM	Plenary Meetings
PYIL	Polish Yearbook of International Law
RBPI	Revue belge de droit international
RCADI	Recueil des cours de l'Académie de droit international
RCDIP	Revue critique de droit international privé
RDI	Rivista di diritto internazionale
RDIDC	Revue de droit international et de droit comparé
RDILC	Revue de droit international et de législation comparée
RDISDP	Revue de droit international et des sciences diplomatiques et politiques
RGDIP	Revue générale de droit international public
RIAA	United Nations, Reports of International Awards
RICR	Revue internationale de la Croix Rouge (see IRRC)

SIPRI	Stockholm International Peace Research Institute
SEMP	Sovetskii ezhegodnik mezhdunarodnogo prava (Soviet Yearbook of International Law)
SFDI	Société française de droit international
SFS	Svensk författningssamling (Collection of Swedish Statutes)
SGP	Sovetskoe gosudarstvo i pravo (Soviet State and Law)
SOU	Statens offentliga utredningar (Swedish Official Reports)
SZIR	Schweizerische Zeitschrift für internationales Recht
TfR	Tidskrift for Retsvitenskap
TIAS	Treaties and Other International Acts Series, issued singly in pamphlets by the US Department of State
UN	United Nations
UNCLOS	United Nations Conference on the Law of the Sea
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGAOR	Official Records of the United Nations General Assembly
UNIDO	United Nations International Development Organization
UNITAR	United Nations Institute for Training and Research
UNJYB	United Nations Juridical Yearbook
UNTS	United Nations Treaty Series
UPU	Universal Postal Union
USCR	United States Congressional Records
UST	United States Treaties and Other International Agreements (volumes published on a calendar basis beginning as of January 1, 1950)
Vienna Conference	Vienna Conference on the Law of Treaties
Vienna Convention (VC)	Vienna Convention on the Law of Treaties, signed 29 May 1969 (also VC)
VJIL	Virginia Journal of International Law
Whitman	Whitman, Digest of International Law (1963—)
WHO	World Health Organization
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ÖZöR	Österreichische Zeitschrift für öffentliches Recht

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NOTE

On November 14, 1987, during the tenth plenary session of the OAS General Assembly, a resolution was passed on '*Standards on Reservations to Inter-American Multilateral Treaties and Rules for the General Secretariat as Depository of Treaties*'. Unfortunately it was not possible to have the text of the resolution available in time to include it in the book.

CHAPTER 1

INTRODUCTION

Legal theory and legal practice linger on in a love-hate relationship and this is especially the case in the realm of interstate relations. The actual conduct of states resembles an unruly horse that cannot easily be tamed by any theoretical shafts. Nevertheless, international lawyers at large will not cease in their efforts to introduce a measure of order into the accumulation of state actions which they conceive as largely reflecting a conformance to a body of consistent norms. This task is certainly not easy, as relations between states will reflect very susceptibly socio-political and technological changes within and between the national entities that constitute the community of states. The rapid and profound changes that have occurred during the 20th century, and especially after World War II, have inevitably engendered a revaluation of many institutions of international law, bringing them either to an irrevocable downfall or infusing them with a radically changed content.

The constant and far-reaching changes we have been witnessing on the international level have nurtured a certain scepticism as to the possibility of arranging the international legal norms, which are supposed to guide and bind states, into a coherent system. Practitioners may often smile at the grandiose efforts by theorists to arrange legal norms in general, and international legal norms in particular, into closed and ideally consistent systems. Kelsen's formalistic approach is one of the better known examples of such an undertaking. However, it appears that practitioners do at the same time envy the position of theorists who have the time and concentration to go to the bottom of the various legal problems.

Practitioners have to make their decisions of legal relevance under pressure of time having to weigh a wide range of considerations, most of which are of a non-legal character.¹ A theorist may for his part feel the shortcomings of not having an immediate insight into the creation and operation of the norms of international law. Much of the documentary material that would be relevant for detecting the motives behind choosing a particular way of action, or for creating a particular norm and dressing it into a specific formulation, will not be accessible to an academic. On the other hand, the informative material may be so abundant that there will be a great temptation to pick and choose the data that best fits into one's theoretical construction, ignoring the more discordant facts. A theorist may become startled by the obvious lack of consistency in the conduct of states. If he had originally hoped to get a lead on a certain line of behaviour that would provide a starting point for establishing the formation of a new norm of international custom, he will become disappointed and frustrated in his search for order and regularity. He may distance himself from any effort to construe international legal norms as a system or he may fulfil the systematization with a certain aloofness with respect to the actual conduct of states.

Such is the reality with which both the theoretically and practically orien-

tated lawyer has to live. There is no point in downgrading the work of either of the professions as both play an important role in making legal norms work. The work of neither one nor the other is isolated and self-sufficient. They are dependent on each other, though this may not always be admitted. Practitioners such as legal counsels and advisers, international judges and arbiters do consult works of a theoretical nature. Theorists, academics and teachers, do inquire into the actual implementation of norms in order to check whether the theory they have developed is able to explain a maximum of legal phenomena. Practitioners, legislators and appliers alike, find that the better the reason for the introduction of a new norm, or the interpretation of an existing imprecise formulation of an existing norm, fits into a theoretical, structured argumentation the more it achieves preponderance and authority. On the other hand, a theory that is unable to explain a certain amount of legal phenomena will lose its trustworthiness and the solutions it proposes will run the risk of being totally rejected.

It would be quite helpful if we had the possibility to combine the skills of the two professions, theoretical and practising lawyers. In the domain of international affairs we may encounter a group of international lawyers that combine theoretical insight with first-hand knowledge of the day to day administration of international legal affairs. We have here the case of 'dédoublement fonctionnel', a notion introduced by Scelle, which could as well be renamed "détriplement fonctionnel".² International lawyers working as teachers and publicists in the academic world, have been frequently consulted by the Foreign Office of their home country as experts at conferences negotiating treaties and may have sat as judges or arbiters settling international disputes. It is evident that all experience and knowledge acquired in such positions is valuable when construing international legal norms as a system which is based on realistic assumptions. One must though always be aware of the tendency of such many-sided lawyers to choose solutions which do not compromise the position of their home country.

Many are the norms and institutions of international law that have had to feel the unpredictable turns in international politics and that have had to experience the crossfire of competing theories. Some of them have not stood the test and have had to be abandoned, or have survived in largely modified forms. This fate is not only the result of the harsh reality of international politics but equally the result of the weaknesses in argumentative justification. Examples of legal norms and institutions undergoing reassessment abound in international law. To mention just a few examples, we have the institution of acquired rights, nationalization, intervention, the freedoms of the sea and, last but not least, the regime of reservations, all of which have undergone changes during a short period of time. Reservations constitute a relatively recent phenomenon of international treaty law. Nevertheless the institution of reservations has experienced a sweeping modification.

The present work tries to approach the question of reservations, describing how the phenomenon of reservations has developed into a problem of international law which has resulted in the need to elaborate a satisfactory regulation of the subject-matter. This again has shown the importance of forming a more lucid idea of what is actually going to be regulated. The history of the regime

of reservations shows clearly the interdependence of regulation and conceptualization. A clarification of the concept of reservation has been considered essential in order to facilitate the implementation of the rules on reservations now laid down in the Vienna Convention on the Law of Treaties (henceforth referred to as the Vienna Convention). The Vienna Convention provisions are to a certain degree deficient and this could be remedied by clarifying the concept of reservation. The definition of 'reservation' to be found in article 2(1)(d) of the Vienna Convention is not completely satisfactory.

States do present the most differing kinds of statements when giving their consent to be bound by a treaty. Evidently not all of these statements qualify as reservations. The indiscriminate application of the Vienna Convention provisions on reservations to all of these statements would either lead to politically unacceptable or factually absurd results. This is why international legal doctrine nowadays agrees that not all formal statements appended to treaties on signing, ratifying or acceding are reservations proper. However, views clash when it comes to determining exactly which type of statements do not amount to reservations. The search for distinguishing characteristics in formal statements has been a crucial task when venturing into the regime of reservations. The present work has not been able to avoid taking a closer look at the concept of reservation.

Of special interest is the relationship between reservations and the category of statements which bear upon the interpretation of the text of a treaty, and which are commonly called 'interpretative declarations'. The question is, do interpretative declarations wholly or partly belong to the concept of reservation. If this is not the case, are they nevertheless by analogy to be governed by the same rules as reservations?

The history of the regime of reservations where the development has gone from the so-called *unanimity rule* which became consolidated during the era of the League of Nations to the *flexible rule* as applied within the Pan-American treaty system, illustrates how political considerations and theoretical arguments go hand in hand. It equally shows that no institution of international law is indisputable but that it can always be questioned.

As in so many other cases, the practice of states in the matter of reservations is quite confounding. During the lengthy deliberations on the reassessment of the reservations regime both the doctrine of integrity and the doctrine of sovereignty were able to present examples from treaty practice that were supportive to their views while ignoring instances that were contradictory to their standpoint. A look at treaty practice in matters of reservations is so multivarious that it may support any assertion but actually affirms none. A complete presentation of reservations practice has not been attempted, due to the great number of statements that have been affixed to treaties by consenting states and the manifest difficulties of indicating every single case whether the statement is a true reservation or only a simple declaration. The examples taken from treaty practice concerning the communication of statements have been presented in order to give a slight apprehension of the kind of statements that have been made, the disposition of various states in forwarding statements or entering objections, and to show the difficulties that are at hand when having to determine the nature of a statement. The examples have been taken mainly

from state practice with respect to treaties that are deposited with the United Nations Secretary-General. Information on the status of these treaties concerning signatures, ratifications, accessions, reservations, declarations, objections and protests are compiled in the UN publication: *Multilateral Treaties Deposited with the Secretary-General*.³

The topic of reservations has proven to be quite comprehensive, bordering on a multiplicity of other problems of international law. It has been inevitable to leave many questions without closer scrutiny. Specific reservation regimes, such as the ones we find in the International Labour Organization (ILO), the Universal Postal Union (UPU), the International Telecommunication Union (ITU) and the Council of Europe have not been discussed in detail but have only occasionally been touched upon. Further problems which have not been dealt with are the effect of treaty succession on reservations, the competence of the various organs sharing the treaty-making power of the state to formulate reservations and to accept or object to reservations by other states and the possibility of reservations to treaty provisions which are declarative of international customary law.⁴

The present thesis concentrates on reservations to multilateral treaties. There has been a vivid discussion on whether reservations are at all possible to bilateral treaties which has not resulted in any final answer in the matter. The International Law Commission (ILC) in its final draft articles on the law of treaties recognized in principle the existence of reservations to bilateral treaties.⁵ The rules on the formulation and legal effects of reservations would concern only reservations to multilateral treaties. The title of Section 2 Part II of the Final Draft reads: "Reservations to multilateral treaties". During the Vienna Conference on the Law of Treaties several delegations desired an amendment to the definition of 'reservation' in article 2(1)(d) making it clear that the concept of reservation would not cover any statements to bilateral treaties.⁶ Due to the failure of the Conference to reach any agreement on the question whether reservations to bilateral treaties were conceptually possible or not the reference to multilateral treaties was omitted in the final text in order not to prejudice the question.⁷ The title of Section 2 Part II now simply reads: "Reservations". It is evident that certain of the Vienna Convention rules cannot be applied in the case of bilateral treaties. It has often been contended that reservations to bilateral treaties do not present any problem, because they may be conceived of as either a new offer reopening the negotiations between the two states on the terms of the treaty or a proposal of an amendment that has to be approved of by the other party.⁸ The question whether a reservation to a bilateral treaty may be tacitly accepted remains unsettled. Does the fact that the other state proceeds to the exchange of ratification instruments after having been notified of the reservations imply acceptance?⁹ In the protocol of exchange of the instruments of ratification of the 1977 Panama Canal Treaties between the United States and Panama the reservations and understandings of the US Senate were inserted and thus acknowledged by the head of state of Panama, Omar Torrijos Herrera. It is not clear whether these reservations and understandings would have had to undergo the same procedure of final consent by the Panamanian authorities as the treaties themselves.¹⁰

PART ONE
RESERVATIONS

CHAPTER 2

THE EMERGENCE OF RESERVATIONS

Reservations, which at this stage may simply be characterized as statements of restricted participation in a compact of norms embedded in treaty instruments, turned into a widespread phenomenon of treaty relations only at the turn of the present century. However the first occurrences of reservations have been placed at the end of the 18th and the beginning of the 19th century. Pomme de Mirimonde mentions as the first occasion when a reservation was formulated to a multilateral treaty, the signing of the Final Act of the Vienna Congress in 1815. The plenipotentiary of Sweden-Norway, Löwenhjelm, added to his signature a formal statement saying that the Swedish government would not accept articles CI, CII and CIV concerning the sovereignty of Lucca and the recognition of Ferdinand IV as King of the Two Sicilies.¹ Reservations to bilateral treaties, as far as one is ready to treat these as reservations proper, were first presented by the United States Senate to the so-called Jay Treaty of 1795 with England.² But reservations remained sporadic and it was not until the adoption of the 1899 and 1907 Hague Conventions on the laws of war that a marked increase in the number of reservations occurred.³

There is certain interest in knowing the exact number of reservations presented to treaties during the various periods in order to know how common the practice of entering treaties with reservations is. However, any effort to present a quantitative outline of reservation practice should be treated with extreme prudence. In spite of the inherent difficulty of such a task quantitative descriptions of reservation practice have appeared from time to time.⁴ A study initiated by the Carnegie Endowment held that 11 out of the 13 conventions adopted at the 1907 Hague Conference on the laws of war were together subject to 67 reservations.⁵ This number has been reiterated by later writers without them undertaking a critical evaluation of the very basis of this study.⁶ The number 67 has been achieved by counting the statements presented by each contracting state signing or ratifying any of the 13 conventions. It has been ignored that a statement may embrace more than one reservation to the treaty to which the statement refers.⁷ A factor that renders an enumerative presentation of reservations difficult is that one state may exclude through its statement one entire article, whereas another may exclude by its statement only one or more of the paragraphs of the same article. Thus, China formulated a reservation to article 19 paragraph 3 of the 1907 Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, which stipulates time limits for filling up the supplies of coal for belligerent warships in neutral harbours.⁸ Great Britain, Japan, Persia and Siam presented reservations to article 19 as a whole, thus also covering paragraph 1 concerning the condition for re-victualing and paragraph 2 on refuelling.⁹ These states were, therefore, in fact presenting three reservations whereas China formulated only one with regard to article 19. We thus have to be aware of the fact that one and the same state-

ment may modify two or more norms. For each new norm that a single statement brings about a modification amounts to a separate reservation. A statement constitutes a reservation only with regard to a certain norm.

There is also another reason why a compilation of reservations is quite difficult to carry out. The concept of reservation has but slowly crystallized during the course of the development of treaty relations. Only because of the recurrent problems that reservations have posed to the operation of treaty norms has the concept of reservation become more precise. From the bulk of the most diverse formal statements that were formerly, without discrimination, labelled reservations various categories have been singled out to form distinct concepts. In spite of the increasing awareness of the distinguishing characteristics of reservations, the difficulties in determining when a statement amounts to a reservation, and when not, are still paramount. Quantitative analyses will therefore remain more or less haphazard. Many of the formal statements made to the Hague Conventions on the laws of war cannot be counted as reservations. One reason is that a considerable number of the Hague provisions do not express explicit duties but only options. Statements that bear upon such provisions do not have a modifying effect on any obligations or rights but simply underline the discretionary nature of the provisions. The rules of the 1907 Hague Convention (I) for the Pacific Settlement of International Disputes were not formulated as binding norms but were only recommendatory. Nevertheless, a large number of statements were made to this convention. These statements can only be understood as declarations that were stressing the non-mandatory nature of the provisions.¹⁰

If one would try to present a quantitative presentation of reservations presented to these conventions of the laws of war, taking into account that one and the same statement may intend to modify a number of norms and that there may be statements (irrespective of whether or not they are termed reservations) that do not alter any norms and therefore cannot be regarded as reservations, we may find that the 67 reservations mentioned above are actually 73 reservations and 30 declarations short of reservation.¹¹ However, even these figures cannot be considered to state the whole truth.¹²

The phenomenon of reservations gives rise to many questions. One may ask what are the causes for the emergence of the practice of presenting reservations to treaties and the increase in their use. Various explanations for this development have been given, none of them being comprehensive. It seems impossible to produce a valid causal explanation for the occurrence of reservations. Even with regard to an individual reservation it would be difficult to identify the manifold causes for the appearance of the reservation. The following have frequently been indicated as factors that cause reservations to be presented:

- (a) the growing preference for legal regulation through treaties
- (b) the growing number of states participating in treaties
- (c) the division of the treaty-making power within states
- (d) conflicts between domestic legislation and international legal commitments
- (e) the presence of irreconcilable ideologies and policies of states participating in a treaty.¹³

(a) It has always been assumed that reservations occur only in connection with creation of norms by means of treaties, written agreements. They do not appear in connection with other modes of norm creation, such as the formation of international custom. A phenomenon that would possibly come closest to reservation would be the case of the persistent objector barring the emergence of a general customary norm that would become binding on such a state.¹⁴ Where a state which has a specific interest in the subject-matter perceives that a general practice is developing which may turn into a binding international custom it may counteract such development by clearly declaring its unwillingness to recognize the bindingness of the practice.¹⁵

The growing importance of treaties as norm-creating agencies is due to the growing preference in the post World War II era for international legal regulation by means of written agreements over international custom. Both sources are presumed to be reliable manifestations of international legal norms that may be applied to the actual legal disputes.¹⁶ A certain reluctance towards international custom as a source of international law has made itself felt due to practical and political reasons. One relates to the difficulties in identifying international custom. International custom is elusive and plagued by many deficiencies. It is not easy to prove the presence of either the material criterion of practice or the psychological criterion of *opinio juris*.¹⁷ The conduct that is believed to be the object of prescription has to be identified through an appraisal of state practice. This practice is not any type of conduct, but a conduct that fulfils the requirements of regularity, consistency, generality.¹⁸ Knowledge about practice is hardly based on direct observations but as a rule transmitted by diverse documents of an official nature. It has been even more cumbersome to ascertain the psychological criterion: the conviction that the conduct reflected in the practice of states is required and prescribed. This *opinio juris* is very seldom explicitly demonstrated by express declarations, but must often be inferred from the actual behaviour of states in situations where the question of prescriptivity is brought to the fore.¹⁹

Compared with custom, treaties seem to provide an easier access to international legal norms. The relevant conduct is indicated by the treaty text. The psychological criterion, the conviction that the conduct should be binding is assumed to be present in the voluntary and formal act of signing, ratifying or acceding. If these acts can be proven to have occurred, it provides comprehensive proof that the specific behaviour is the object of legal regulation providing binding prescriptions. The advantage of treaties as being a reliable and easily accessible source of information about legal norms, has accelerated the efforts to make norms of international law treaty-based. Treaties are not only employed to regulate virgin subject-matter but are also used to state more clearly norms that already operate on a customary basis.

Another frequently mentioned deficiency of international custom, beside its elusiveness, is the supposed slowness of its formation. This view is not an absolute truth, as one readily admits that custom may arise during a relatively short period in our present era of intense and regular contacts between states.²⁰ On the other hand, the elaboration and entry into force of treaties may take quite a long time.²¹

Where concrete norms of international law are elaborated through formal

written agreement, states which have an interest in the matter and desire to participate in the treaty have to make up their minds if they are able and willing to subscribe to all the norms that are introduced by the treaty. Treaties do more conspicuously force states to clearly name their hesitation or opposition to those norms which they do not consider themselves able to act upon. A state which is unable to accept the whole of an adopted treaty text may have the choice of remaining completely outside the treaty, or participating in it but entering a reservation with respect to a treaty norm it is not ready to accept. There are to my knowledge no comparative studies showing which is the more commonly resorted to alternative. Where practice may turn into binding custom states feel less pressure to reserve their position. Norms of customary law do often have an indeterminate scope leaving a certain room for individual appraisal by states. As soon as the customary norm is to be clarified and delimited by codification some states may feel the need to dissociate themselves from the regulation.

(b) The fact that the number of states participating in a treaty has constantly grown has also been mentioned as a factor causing an increase in the number of reservations. Beside the traditional bilateral treaties we have acquired an important body of multilateral treaties intended to achieve regional or universal application. More than 150 states may nowadays take part in the elaboration of treaties under the auspices of the United Nations.²²

Negotiating a treaty between a large number of states will make the meeting of minds and the confluence of views a difficult task. Therefore the elaboration of general treaties has, as mentioned above, turned into a time-consuming and unwieldy affair. This fact has in its turn had an impact on the procedures for the adoption of a common treaty text. Whereas the conferences of the 19th century followed the principle of unanimity as regards the decisions for adopting the final treaty text, this rule was more and more abandoned in the post World War I period in favour of the 2/3 majority rule.²³ The shift towards this majority rule came slowly. The unanimity rule of the early conferences was first limited to the final adoption of the text, whereas decisions on the substance of the individual provisions were taken by a majority vote. The switch towards the majority rule was partly facilitated by the emergence of international organizations, where decisions by 2/3 majority became the rule.²⁴ Though the 2/3 majority rule was approved of as facilitating the achieving of a common treaty text, states still maintained the stubborn wish to safeguard their sovereign freedom of action. States not succeeding in having their views and interests accommodated in the treaty provisions are naturally presumed to be critical to the outcome of negotiations and hesitant if not completely adverse to consenting to the treaty. For a state whose views had been overruled there was always the possibility to remain outside the treaty. However, many states experienced the situation of having only the choice of submitting to the treaty as such, or of abstaining from becoming a party, as manifestly unsatisfactory if not unjust. Multilateral conventions were often of universal concern and a state may have strongly felt the disadvantages of not becoming a party to such a treaty and therefore unable to profit from a norm system of general concern. Reservations have therefore been welcomed as a way of moderating the impact of the 2/3 majority rule.²⁵

To prove the tenability of the assertion that the introduction of the 2/3 majority rule did occasion an increase in the number of reservations would necessitate a closer scrutiny of reservation practice during the period of unanimously adopted treaties and the period of majority-adopted treaties. The realization of such a study would be difficult for two reasons. Firstly the number of unanimously adopted treaties is insignificant compared to those adopted under the 2/3 majority rule. Secondly, the number of negotiating states during the era of unanimous adoption was moderate compared with the number of states negotiating treaties at a later period. However, this much can be stated without being erroneous, the introduction of the 2/3 majority rule was neither a necessary nor sufficient condition for the appearance of reservations. Reservations have been presented even in those cases where the treaty has been adopted on the basis of unanimity. The conventions of the First and Second Hague Peace Conference of 1899 and 1907 were unanimously adopted but there was still an abundance of reservations and other statements which were largely believed to limit the effective operation of these treaties.²⁶ Even the Genocide Convention, the reservations to which led to the reassessment of the rules on reservations, was adopted by the UN General Assembly by a unanimous vote of 56 states on 9 December 1948 (Resolution 260 (III)).²⁷ The fact that a state has been overruled when voting on the definite wording of the treaty does not necessarily lead to the formulation of a reservation by such a state.

Against the belief that only majority-voting will encourage reservations speaks the case provided by the 1982 Law of the Sea Convention. Article 320 of this convention expressly forbids the formulation of reservations in those cases where this is not explicitly permitted by the convention. The drafters desired a treaty that could count on the approval of all the negotiating states, or at least would not meet with any express opposition by any state, they therefore chose to adopt the treaty provisions by consensus.²⁸ As such a procedure easily results in watered down formulations, it was felt desirable to restrict the freedom to present reservations which could lead to a further weakening of the convention norms.²⁹ It was clearly felt to be deceitful to introduce reservations to a provision that had been hammered out during lengthy debates in order to reconcile all divergent views. The prohibition of reservations in the 1982 Convention clearly indicates the recognition of the possibility of reservations even though the provisions of the convention are based on general consensus.

(c) As a third reason for the rise in reservation practice the increase of parliamentary control over the treaty-making procedure has been mentioned.³⁰ The legislative bodies of states have generally acquired the competence to make the final participation in a treaty conditional on its approval. This development has not automatically resulted in the right of parliaments to require reservations to be formulated when giving their consent to treaties. It must further be the case that the legislative has acquired the recognized discretion to make its acceptance conditional. In the standard example of the United States we find that the legislative, that is the Senate, has a wide freedom in determining which parts of the treaty it wants to accept and which not.³¹ However, it seems that the cases where the legislative may only accept the treaty

in its entirety or reject it altogether are more numerous. For example in France, the Federal Republic of Germany (FRG), Finland and Japan the legislative does not have the capacity to formulate reservations independently of the government.³² Even in countries where the legislative may have a large degree of discretion as to the formulation of reservations, it does not necessarily mean that this discretion will actually be used. Where we find that the executive and the legislative follow a policy of smooth co-operation, the legislative being consulted in the early phases of treaty negotiations, reservations may be unnecessary as desired adjustments may be satisfied in the course of elaborating the treaty text. In the case of the United States, the competence of the President and the Congress in the field of international affairs is under constant reconsideration. Reservations and other statements forwarded by the Senate often play the role of demonstrating the preponderant wish of Congress to maintain its influence in the administration of foreign affairs.³³

(d) The fourth reason that explains the presence of reservations is their function to establish concord between a state's international engagements and its internal legislation. Reservations in such cases indicate the unwillingness, or the momentary impossibility, to adjust domestic legislation to meet the requirements of a treaty. On the other hand, the absence of reservations does not have to signify that there is conformity between the municipal laws of a non-reserving state and its international commitments. Some states may be less anxious to secure harmony between their national and international norm systems. Allowance must also be made for the possibility that the authorities of a state are unaware of such inconsistencies. It does happen also that reservations are unnecessarily entered into *ex abundanti cautela* when the government is not sure if its national law is consistent with the provisions of a treaty.³⁴

States taking an interest in eliminating possible conflicts between their internal laws and their international engagements may choose between either waiting with their final consent to the treaty until the necessary amendments have been introduced into domestic legislation, or to ratify without delay but subject to certain reservations with regard to the parts of the treaty where national law is at deviance, withdrawing the reservations at a later date. Which alternative would seem more expedient depends on many factors, the interest of achieving as fast as possible a sufficient number of ratifications to let the treaty enter into force, the wish to profit as soon as possible from the benefits of becoming a party to the norm system, the time it will take to affect the necessary amendments in the internal legislation, etc.

Within the Organization of American States (OAS) Paraguay proposed the introduction of a new category of reservations called 'reservations of theoretical adherence', where a state is willing to subscribe to the rules as set forth in the treaty, but where it is unable to effect the necessary changes of its internal laws within a reasonable time. Such a reservation would indicate that there is no basic disagreement with the aims of the treaty and that the reserving state is ready to undertake "... legislative negotiations as soon as possible looking to the modification of domestic conditions which would make possible ... coming into force the rule in question".³⁵ It was believed that this new category of reservations would not introduce any greater certainty into treaty implementation than the traditional reservations. It would, in fact, have the

opposite effect. Such a reservation would not specify which individual treaty norms would not operate because of their being contrary to internal law. Nor did the proposal provide for an obligation for the reserving state to notify the depositary or other parties when the necessary amendments of the domestic laws had been carried out and the treaty was to operate to its full extent. The Inter-American Juridical Committee (IAJC) was not ready to recommend the use of reservations on theoretical adherence.³⁶ Certain of the conventions elaborated under the auspices of the Council of Europe authorize reservations where domestic laws are inconsistent with the treaty norms. This authorization may be conditional on the presentation of the text of the inconsistent laws.³⁷

(e) Reservations have also been conceived of as a weapon in the struggle between competing ideologies and policies. Reservations have been used to safeguard the interests of a group of states which regularly constituted a minority in treaty negotiations. At the time when the whole institution of reservations was ripe for reevaluation, the socialist states and the newly independent states found themselves in a constant minority position, wherefore reservations had a heightened importance for them. It was also stressed that reservations were non-existent because they were unnecessary in treaty relations between socialist states.³⁸ Nowadays when the international community has a radically changed composition this aspect has lost prominence.³⁹

These are the most common answers to the question of why reservations have emerged and why their number is increasing. As explanations they are of only limited value. We may only propound that the occurrence of reservations is caused by an ever-changing combination of factors, some of which may be more manifest, others more concealed. The various elucidations of the factors that lead to the formulation of reservations have had the character of common sense assumptions stating no more than that certain states of affairs do favour the initiation of reservations more than others.⁴⁰

The familiar and common assertion that the number of reservations increases with the number of treaties appears a simple truism. It can be verified that the number of treaties has increased during the 20th century, and most remarkably so during the post World War II era when a large number of newly independent states have been introduced into the world community of states. The increase in the number of states correlates with the increase in the number of treaties which again correlates with an increase in the number of reservations. Gamble in his statistical survey on reservation practice shows that a hypothetical "average" multilateral treaty that entered into force during the League of Nations era had approximately 0.2 reservations. The equivalent figure for the post World War II period until 1971 was 0.85 reservations per multilateral treaty.⁴¹ This seems to be a considerable increase, but the figure is brought down to more modest dimensions when taking into account that the number of parties to multilateral treaties has also increased. Considering this and comparing the amount of reservations with the number of commitments by individual states to these treaties we have only an insignificant increase.⁴² Gamble's study lacks a thorough analysis of the concept of reservation, his study also covers statements that are not true reservations but are more properly referred to the group of declarations.

CHAPTER 3

THE NEED FOR RULES ON RESERVATIONS

The appearance of a new social phenomenon does not as such necessarily lead to its legal regulation. Not until the phenomenon is considered a problem will the need for binding rules be felt. Sociological studies on norms have tried to show the various stimuli that lead to the creation of norms. Gould and Barkun in their study on international legal norms mention some examples of such norm-generating stimuli. Changes in the environment may create new problems which require common solutions according to fixed rules.¹ The problem may be conceived of as having a positive character when the achieving of certain goals is possible only through common efforts and co-operation. States may not be able to carry out certain programmes on their own, but hope to do so on the basis of common effort. Such common effort may be required for the launching of telecommunication satellites or the founding of research centres, projects that demand costly investments and highly qualified expertise which minor states cannot provide on their own. Once states have settled for common enterprises, norms will become necessary to make such co-operation possible. Or the problem may be of a negative character if it consists of a threat that is directed against two or more states, such as the pollution of the air and water systems which does not respect national boundaries. Even the development and accelerating production of advanced weapons technology is a threat against more than one state and has to be countered by universally operating norms.²

Furthermore, it has been contended that sudden deviation from a general practice may lead to the creation of a norm. Regulation is often a response to non-conforming behaviour. The drive for regulation may be of either a restoring or a confirming nature. In the first case, the deviation is considered to be disquieting and norms are introduced to guarantee the persistence of earlier practice. In the second case, the deviation is welcomed as salutary and therefore meets with approval. The elaboration of new and clearly stated norms may counter any claims to restore earlier practice.

The appearance of a conflict leading to the articulation of claims and demands may also initiate a norm-creating process.

In the case of reservations the rules that were introduced to direct their operation were the outcome of concrete disputes that arose in connection with the formulation of reservations. Although reservations are said to have appeared for the first time more than a hundred years ago, it was not until after World War I that there was felt to be a need for clearly stated rules on the formulation and operation of reservations.

Earlier, in connection with the impressive number of reservations and other statements that were presented to the 1899 and 1907 Conventions of the Hague Peace Conferences, reservations were considered by certain writers to pose a problem because they endangered the effective operation of treaties.³ The

reservations proposed in connection with the negotiations and the signing of the Versailles Peace Treaty by, among others, the United States and China turned out to be the incident that awakened the interest of scholars in the problems connected with the presentation of reservations. One of the first major treatises on reservations is the work of David Hunter Miller, who had been the representative of the United States at the peace talks in Paris.⁴ The fourteen so-called Lodge amendments called for by the US Senate created a certain amount of irritation at the negotiations. In spite of the fact that the other negotiating states finally agreed to accept these reservations, the United States decided in the end to abstain from ratifying the Versailles Treaty.

The demands for clear rules on reservations were to become preponderant in connection with the codification work of the League of Nations. The 1925 Opium Convention was elaborated and adopted under the auspices of the League of Nations. Certain states that had not participated in the negotiations on the convention were invited to sign it by 30th September 1925. Austria was one of the invited states and it did sign the convention on the last day with reservations regarding the obligation to send a certificate of export authorization to the importing state (articles 13(4) and 15) and to furnish quarterly statistics to the Permanent Central Board constituted under the convention.⁵ When the Secretary-General of the League of Nations fulfilling his depositary functions notified the other contracting states of Austria's reservations, the United Kingdom declared its opposition to this action and asked for a closer investigation of the matter in order to clarify the principles that should rule the admissibility of reservations in the future.⁶ The Committee of Experts for the Progressive Codification of International Law appointed a subcommittee to investigate the matter.⁷ The proposal of the subcommittee was adopted by the Committee of Experts, which referred it to the Council of the League of Nations for final approval. The Council confirmed the principles laid down in the report in its resolution of 17 June 1927.⁸ Thus, the so-called unanimity rule was confirmed. The unanimity rule was further upheld by the League of Nations Assembly in a resolution of 25 September 1931 which related to the reservation by Cuba and the entry into force of the Protocol concerning the revision of the Statute of the Permanent Court of International Justice.⁹

The rule of unanimity required the acceptance of a reservation by all the contracting parties in order for it to become effective and to make the reserving state a party to the treaty. The rule was uncompromising as it had the effect of excluding the reserving state from participation in the treaty, even in a case where only one single state objected to the reservation. The Secretary-General of the League had the obligation to apply the rule with regard to all the treaties for which he acted as depositary. He was to communicate each reservation to every contracting state so that they would be able to decide how to react. Notification was of importance in all those cases where reservations were presented at a time other than the collective signing of the treaty, such as the differentiated signing over a certain period, ratification or accession.

The unanimity rule remained undisputed to the end of the League of Nations era, leaving aside certain special arrangements on a regional or technical basis.¹⁰ The Secretary-General of the United Nations continued the practice of his predecessor.¹¹ The reassessment of the unanimity rule became inevitable

with the dispute that arose in connection with the reservations that were formulated to the Genocide Convention in 1949 and 1950. The Secretary-General was there faced with the problem of deciding whether he could include those ratifications supplied with reservations in the 20 ratifications or accessions that were necessary to bring the Convention into force.¹² He was simply following an established procedure, when inquiring into the attitudes of those states having already deposited their instruments of ratification or accession and not having made any reference to prior reservations.¹³ As a result of his announcement, which stated that he would consider silence as a tacit acceptance of previously presented reservations, some of the states having ratified or acceded did declare that they were not in favour of the reservations.¹⁴ With regard to the states having ratified or acceded to the Convention with reservations he simply acknowledged the receipt of the instrument of ratification, respectively accession, but did not accept them for deposit before it was evident that they would not meet with objections.

The question as to which states were entitled to express their views was of primary concern to the unanimity rule. The Secretary-General as depositary had to follow the practice of not extending the right to express their views to all the states which would possibly have had an interest in the treaty, but to limit it to those that had demonstrated their intention to become a party to the treaty. The Secretary-General had to distinguish between two situations. In the case where the treaty had already entered into force, the right to express one's view by accepting or objecting to the reservation was extended only to those states having given their definitive consent to be bound by the treaty prior to the reserving state. If the treaty had not yet entered into force, the right to accept or object was conceded to those states that had already ratified or acceded to the treaty, or that were to do so before the last instrument of consent (ratification, accession, etc.) that would bring the treaty into force had been notified.¹⁵ In the case of the reservations to the Genocide Convention one of the states objecting, the United Kingdom, had neither signed, nor ratified nor acceded to the Convention. The United Kingdom was thus not qualified to make a valid objection. It had received information of the reservations through a notification by the Secretary-General which had been addressed to each member state of the United Nations and to each non-member state which had been invited to become a party to the Convention.¹⁶ Only states that had ratified or acceded to the Convention were required to present their objections in order to avoid their silence being construed as an acceptance.¹⁷

Owing to the steps taken by the Secretary-General eight states replied to this inquiry in a way that could be understood as constituting objections.¹⁸ The unanimity rule would have debarred the reserving states from participation in the Genocide Convention and would have made it impossible for the Secretary-General to count their instruments of final consent for determining the exact date of entry into force of the Convention. As the line of action followed by the Secretary-General was criticized, the dispute was referred to the UN General Assembly where the VIth Committee was to review the depositary practice and discuss the value of the unanimity rule.¹⁹ The discussions that ensued revealed deep disagreement and resulted in a certain confusion as to the authority of the unanimity rule. The General Assembly finally agreed to

request the International Court of Justice (ICJ) to deliver an advisory opinion and the ILC to give priority to the question of reservations in its work on the codification of the law of treaties.²⁰

The discussions during the 5th session of the General Assembly and the advisory opinion of the ICJ of 25 May 1951 were the turning point, initiating a process which finally led to the reformulated rules on reservations that we now find in part II section 2 of the Vienna Convention on the Law of Treaties. These rules clearly have the character of a compromise. They are principally based on considerations of flexibility but make certain concessions to the idea of the integral application of treaties. This is reflected in the reference to the principle of compatibility of reservations and the recognition of special regimes with regard to treaties that contain the constitution of international organizations or which are intended to operate between a limited number of states for a specific purpose.

The majority view of the ICJ in the *Reservations to the Genocide Convention* case held that the unanimity rule is but "... an administrative practice, which, after being observed by the Secretariat of the League of Nations, imposed itself, so to speak, in the ordinary course of things on the Secretary-General of the United Nations ...".²¹ This seems too hasty a condemnation of the unanimity rule. True it was first formulated in a non-binding resolution of the Council of the League of Nations and later reiterated in an equally non-binding resolution of the League Assembly.²² However a closer look at the depositary practice of the League of Nations, and also that of the United Nations during its first years of existence, as well as that of individual governments, speaks strongly in favour of the assertion that the unanimity rule was a legally binding rule.²³

Practice prior to the formulation of the unanimity rule in the League resolutions seemed to require the acceptance of all the contracting states, an acceptance that could either be express or tacit. Acceptance was considered to be express if the reservations were formulated at the moment the treaty was collectively signed or inserted in the *procès-verbal* recording the deposit of ratifications. Austria-Hungary, Germany, Japan, Montenegro, Russia and Turkey endorsed their reservations upon the original 1907 Hague Convention (IV) Respecting the Law and Customs of War on Land together with their signatures.²⁴ The other signing states were considered to have approved of these reservations. When drawing up the protocol of deposit of ratifications on 2 January 1892 relating to the 1890 General Act of Brussels the reservations and interpretative declarations of France and Turkey were inserted and explicitly acknowledged in the protocol.²⁵

Examples of treaties to which reservations and declarations have been presented and unanimously accepted abound. The following cases are commonly referred to:

- (1) The General Act of 1890 relative to the African Slave Trade
- (2) The International Sanitary Conventions of 1892, 1894, 1902 and 1912
- (3) The Hague Peace Conference Conventions of 1899 and 1907
- (4) The International Wireless Telegraph Convention of 1912.²⁶

It may be contended, as the ICJ did, that the unanimity rule was never really brought to the test. Contracting states had been either openly in favour of proposed reservations or declarations, or had at least acquiesced in by not contesting them. It must be borne in mind that the presentation of reservations led to certain inconveniences for both the reserving state and the other states or the so-called confronted states.²⁷ The instrument of ratification or accession containing a reservation was not immediately accepted for deposit, but was held pending the reaction of the contracting states. It is hard to believe that a reserving state would tolerate this inconvenience if it had not recognized the unanimity rules as binding.²⁸ A further inconvenience was the postponing of the entry into force of the treaty while awaiting the reaction of the contracting states towards the reservations. Such a situation could not have remained unchallenged had not the unanimity rule been considered as binding.

More weighty arguments for the bindingness of the unanimity rule would be provided by such occasions where reservations had led to objections. Such examples do exist although they are few. In the case of an objection the reserving state would have either to abandon its reservation or remain outside the treaty. A state would hardly submit to such a regime if it did not approve of the unanimity rule. Inquiries into early reservation practice show that reserving states affronted by objections did accept the implications of the unanimity rule. The following examples may be mentioned:

1. The delegate of the Ottoman Empire announced his intention to present various statements to the 1903 International Sanitary Convention in accordance with statements made during the negotiations. The president of the Conference considered that Turkey under these conditions could only sign the protocol of signature. Turkey preferred to remain outside the Convention.²⁹

2. Germany tried to propose a reservation that would have modified article 6 of the 1910 Convention for the Suppression of White Slave Traffic consistent with its proposed amendment to that article, which was voted down during the negotiations. As the other signatories objected to the reservation, Germany decided to abandon it and made a new reservation excluding the whole article, and this received the approval of the other signatories. Germany was forced to alter its reservation in order to be permitted as a party to the Convention.³⁰

3. During the elaboration of the Versailles Treaty China announced on various occasions that it intended to formulate a reservation to the provisions relating to Shantung (articles 157–158) referring to Japan the rights Germany had had in the territory. As China was informed by the Secretary-General of the Conference in response to its ultimate announcement of the intention to formulate a reservation at signature, that the council would not consent to the reservation, China decided to refrain from signing the treaty.³¹

From the period of the League of Nations further examples may be provided, where reservations have either been generally accepted explicitly or implicitly or where objections have resulted in withdrawal of the reservation or abstention from participation in the treaty.³²

1. The Swedish government intended to accede to the 1925 Opium Convention subject to a reservation to article 6(c) obliging pharmacists to keep records on all sales with medicine containing opium and similar drugs. The Secretary-General of the League of Nations communicated the text of the reservation to

all the governments interested in the Convention. Great Britain, Monaco and Switzerland declared that they would follow the opinion of the Opium Advisory Committee to be given in the matter. Cuba, Egypt and Italy expressed their doubts as to the necessity of the Swedish reservation. Other states like Austria, Japan, Czechoslovakia and Australia had no "objections" to or no "opinion" on the Swedish reservation.³³ The League Council decided to refer the matter to the Advisory Opium Committee for a report as done with the Austrian reservation one year earlier. Sweden was not opposed to this procedure.³⁴ The Council then discussed the Swedish reservation on two occasions, in February and April 1928. Although the Committee had recognized the difficulties of the Swedish government it was unwilling to recommend the acceptance of the reservation.³⁵ Sweden finally acceded to the Convention without the reservation.³⁶

2. A Protocol on the Revision of the Statute of the Permanent Court of International Justice was opened for signature on 14 September 1929. When Cuba wanted to deposit with the Secretary-General of the League of Nations its instrument of ratification containing serious reservations, the Secretary-General did not accept the ratification for deposit and asked the states concerned to inform him whether they were able to accept the reservations. As a number of signatories were not willing to accept the reservations and it therefore became evident that the Cuban ratification could not be considered effective, Cuba abandoned its reservations.³⁷

3. Hungary and the United States presented on 16 April 1927 respectively 21 March 1929 their instruments of accession to the 1926 Slavery Convention subject to reservations.³⁸ The League Secretariat received them only on the condition that the signatory states or the states having finally consented to the Convention would accept the reservations.³⁹ It is not clear at what time the statements had become accepted. The Hungarian government declared that its accession would become effective as soon as the governments of a number of specified states "auront déclaré leur acceptation" of the statement.⁴⁰ As such an approval had not been express Hungary was assumed to have abandoned its statement and acceded unconditionally.⁴¹ With respect to the US statement express acceptance had not been asked for by the US government and as there had been no opposition the statement had become effective.⁴² The Harvard Draft thus assumed that the application of express and tacit acceptance depended on the intentions of the declaring state.⁴³

4. A case that came close to a challenge of the unanimity rule was the notification of accession by the Soviet Union subject to a reservation to the 1933 Geneva Convention for Facilitating the International Circulation of Films of an Educational Character on 28 March 1935. Chile refused to accept the reservation wherefore the Soviet government proposed that the Convention should not apply between the Soviet Union and Chile, while applying between it and states accepting the reservation. The Chilean government was ready to accept this solution.⁴⁴ However, as subsequently Switzerland declared its disapproval of the reservation and Iran reserved its position with regard to it, the Soviet Union decided to remain outside the Convention.⁴⁵ The League Secretariat was therefore not compelled to decide if the legal effects of the unanimity rule could exceptionally be circumvented by an agreement between the reserving and the objecting state.⁴⁶

As concerns the practice of the UN Secretary-General relevant instances were quite few. In none of them any objection or disapproval was involved, but the relevant instruments of acceptance were not received for deposit before the other parties had given their approval. The Secretary-General furnished the following three examples from his practice up to 1950:⁴⁷

1. In 1948 the United States wanted to accede to the Constitution of the World Health Organization with an "understanding" concerning the right to withdraw from the organization. Not until the World Health Assembly by unanimous decision accepted the US instrument as not inconsistent with the Constitution did the Secretary-General proceed with his notification that the United States had become a party.⁴⁸

2. In 1949 the Union of South Africa desired to sign the Protocol modifying certain provisions of the General Agreement on Tariffs and Trade with a statement concerning the application of one of its provisions. The Union of South Africa was allowed to sign a *procès-verbal* of signature but it was not to have any legal effect before each contracting state had given its approval. This approval was delivered at a common meeting between all the contracting states.⁴⁹

3. Similarly, Southern Rhodesia notified its acceptance of the Protocol modifying Part I and Article XXIX of the General Agreement with a statement reserving its position with regard to an article of the General Agreement. The instrument of acceptance could only be received for deposit once the contracting states by a common declaration had unanimously declared the Southern Rhodesian acceptance to be valid.⁵⁰

The advisory opinion of the ICJ, which was adopted with a very narrow margin (7 to 5), instantly met with heavy criticism.⁵¹ The view of the majority of the judges must be seen against the background that the Court is only able to argue *de lege lata* and that the judges were realistic enough to admit the defects of the unanimity rule and its incapability to meet the new demands of a largely changed international community. It seemed most convenient to pronounce that the unanimity rule had never achieved the character of a legally binding rule. The solution chosen by the majority seemed to be also the expedient one. By conceiving reservations to belong to a domain hitherto not regulated by legal rules, but where legal norms had still to be developed, problems of retroactivity could be elegantly avoided. If one only accepts that the unanimity rule had been legally valid but was giving way to a new, more flexible rule, the question arises as to which rule should govern reservations that are subsequently formulated to treaties which have been concluded during the era of the League of Nations or under the auspices of the United Nations before the advisory opinion of the ICJ. Neither those who shared the opinion of the majority nor those who maintained the view that the unanimity rule had had the character of a legally binding rule ventured into the problems of retroactive application. Practice does as a rule not seem to have had any doubts in applying the new rules in the Vienna Convention to reservations that have been formulated later to treaties concluded before 1951.⁵² There is only one example of a treaty formerly deposited with the League of Nations Secretariat where the question of applicability of the unanimity rule has been considered. Seven socialist states presented identical reservations and declarations to the 1936 Convention on the Broadcasting for Peace. The United Kingdom was the

only state objecting to four of the statements but saved the UN Secretary-General from a troublesome problem by stating that it does "... not, however, consider these objections as precluding the entry into force of the Convention for ... " (Bulgaria, the GDR, etc.).⁵³

Curiously enough the majority of the ILC whose task it is to be receptive to *de lege ferenda* considerations, was in fact, critical to the implications of the advisory opinion of the ICJ and was not ready to abandon the unanimity rule.⁵⁴ A shift in the attitude of the ILC occurred only slowly. The second rapporteur on the law of treaties, Lauterpacht, stated, in his first report from 1953 (UN Doc. A/CN.4/63) and in his second report from 1954 (UN Doc. A/CN.4/87) the unanimity rule as expressing properly the state of existing law. He said that, "In the view of the Commission, article 9 as here drafted ('A signature, ratification, accession ... is void if accompanied by a reservation or reservations not agreed to by all other parties to the treaty') must be regarded as probably still representing existing law."⁵⁵ and that, "... nothing decisive has occurred to dislodge the principle of unanimous consent as a rule of existing international law ...".⁵⁶ However, Lauterpacht was open to a more flexible system with regard to the future operation of reservations and declared in 1953 that, "... the Commission ... is not now of the view that it constitutes a satisfactory rule and that it can – or ought to – be maintained" and in 1954 that, "... the unanimity rule ... with some hesitation though in conformity with the view previously expressed by the Commission as to the *lex lata*, is unsatisfactory in many respects."⁵⁷ The third rapporteur, Fitzmaurice, did not only consider the unanimity rule to be *de lege lata*, but worthwhile maintaining *de lege ferenda*. Draft article 39(3) in his first report from 1956 (UN Doc. A/CN.4/101) was formulated in the following way:

"If a reservation meets with objection, and if the objection is maintained notwithstanding any explanations or assurances given by the reserving State, the latter cannot become, or rank as, a party to the treaty unless the reservation is withdrawn."⁵⁸

By the 1962 session of the ILC the time had become ripe to propagate more whole-heartedly a liberal reservations regime as exemplified by the Pan-American system.⁵⁹

It is submitted that the unanimity rule was generally approved of as being a valid rule of treaty law, but that the discussions in the VIth Committee during the 5th session of the UN General Assembly and the advisory opinion of the ICJ, which ensued from the dispute concerning the reservations to the Genocide Convention, made it apparent that the time had come to reconsider the value of the unanimity rule.⁶⁰ The basic assumptions on which the unanimity rule had been construed, such as conceiving treaties analogous to contracts and the unanimous consent to reservations as guaranteeing the integrity and, therefore, also the efficiency of treaty norms were made the object of fresh evaluation which revealed the weaknesses of the arguments justifying the unanimity rule. The *Reservations to the Genocide Convention* case provides an illuminating example of how concrete conflicts may put traditional legal rules to the test and eventually bring their downfall, thereby preparing the ground for the rise of a new generation of rules.

CHAPTER 4

ARGUMENTS FOR AND AGAINST THE TRADITIONAL UNANIMITY RULE AND A LIBERAL REGIME

The rule of unanimous acceptance of reservations, usually called the unanimity rule, had to undergo a thorough examination during the 5th session of the General Assembly, the deliberations of the ICJ for its advisory opinion of 1951 and, last but not least, the discussions within the ILC. The dispute over the reservations to the Genocide Convention had the salutary effect of making an inventory of the old arguments and searching for new arguments, as well as letting them undergo a critical evaluation. One of the decisive factors which brought the downfall of the unanimity rule was the weakness of the arguments that were presented in favour of it together with its unsatisfactory operation. The arguments that were brought in favour of the unanimity rule were partly of a theoretical and partly of a practical nature.

4.1 THE THEORETICAL ARGUMENTS FOR THE UNANIMITY RULE: THE ANALOGY WITH CONTRACTS

The legal justification of the unanimity rule was based on an analogy between international treaties and contracts of private law, which led to the conception that reservations had to be compared to counter-offers. This is not surprising as traditional international law relied heavily on analogies with concepts and institutions common to the legal systems of the Western societies.¹ One of the earliest occasions when treaties were equated to contracts was the case of the *Fourteen Diamond Rings* decided upon by the US Supreme Court in 1901.² The analogy with contracts was stubbornly sustained by those members of the ILC which were advocating and vindicating the unanimity rule.³ This analogy was certainly applicable with regard to bilateral treaties. With regard to multilateral treaties the analogy is less convincing. The elaboration of multilateral treaties is a complex procedure of bargaining, receiving of benefits and making of concessions. The original initiative may be hard to trace and the finally adopted text cannot be said to be the work and offer of only one party but is more the outcome of joint effort. The argument justifying the unanimity rule did assume that the adopted text was an offer. The question automatically arises whether this analogy is tenable and may the unanimity rule be inferred from this analogy?

If the treaty text as adopted is an offer and a reservation a counter-offer, do the offeree and all the other negotiating states jointly form a fictitious offeror? If we have the situation where more than one state formulates a reservation, the identity of the collegiate offeror and the acceptor changes, but the original offer remains always the same. We have here a situation with two fictitious entities, a fictitious offeror and a fictitious offeree, which both have an ever-changing identity.

Even if we would tolerate such a situation it still remains to be proven that the states constituting together the offeror have to react in unison towards the reservation being a counter-offer. The concept of contract as such does not imply that the confronted negotiating states are forced to act in unison. This can only be maintained if the contract is to be of such a specific nature. The only writer who seems to have ventured deeper into this question is Owen.⁴ She believed that the only type of contract that it was possible to take as a basis for the analogy was the concept of correality in Roman Law. The correal obligation was not only economically but also legally speaking a single obligation according to the view of Sohm.⁵ Romans considered the correal obligation to be *communis obligatio* or *una obligatio*. Although the correal obligation originated from many obligations, it was not simply the sum of mutual obligations that had fused into one single obligation. According to this analogy with a contract embracing a correal obligation, a treaty provision would have to be construed as expressing one single, but many-sided, obligation. If the treaty was to be modified by a reservation, this would then automatically alter the relations between all parties. The unanimity rule was not ready to go that far. Even though the reservation would have to be accepted by all the confronted negotiating states, the treaty relations between the other states remained unaffected by the reservation. The view of the correal obligation as a *una obligatio* has been criticized by Buckland who considers the characterization to be metaphysical and useful only in describing peculiar modes of discharge.⁶ During the times of Hadrian and Justinian the difference between the correality and the simple solidarity disappeared. The fulfilment of the correal obligation could be divided in a case where there were many debtors. Where there were many creditors each one could, independently of the others, relinquish his claim. The concept of correality thus recognized an independence of action, and this does not go well with the basic idea of the unanimity rule. The concept of contract does not as such bind a number of offerors to some uniform reaction towards a counter-offer. It is well conceivable that where the offerors disagree on the counter-offer, those who are in favour of the counter-offer may enter a contract according to the new terms, whereas those opposing it may choose not to enter any contract at all. The analogy with contracts is unhappy as it purports to provide an apt justification of the unanimity rule though it in fact does not succeed in this. The analogy with contracts may be justified because it is intended to stress the consensual nature of treaties. The elaboration of bilateral treaties may resemble to a certain extent the entering into a contract. However, with regard to multilateral treaties such a characterization appears to be too superficial. Bids and offers are formulated within groups of ever-changing membership and addressed to other groups of equally fluctuating constellation. Proposals are as a rule adopted on the basis of decisions according to the 2/3 majority rule. Proposals that have not succeeded in achieving the necessary majority may reappear later in the guise of reservations. They are therefore the manifestation of the absence of an agreement, or the absence of consensus. Or to put it in contractual terminology: A reservation is in such a case a counter-offer that has been rejected. The unanimity rule has an effect that is contrary to the conception of treaty relations as being consensual. The unanimity rule allows a single objection to preclude the reserving

state from becoming a party to the treaty in the case when it is not ready to abandon its reservation, and this is the case even if all the other negotiating states would be ready to accept the reservation. The unanimity rule would give each single confronted state the possibility to exclude a reserving state from participation in the treaty, or what has also been called the power of veto.⁷

4.2 THE PRACTICAL ARGUMENTS FOR THE UNANIMITY RULE: CONSIDERATIONS OF INTEGRITY AND EFFECTIVITY

A justification of a more practical kind was provided by the argument that a flexible reservation regime would violate the integrity and endanger the effective operation of a treaty, something that would not be possible under the unanimity rule. This justificatory argument asserts two things: firstly, that the unanimity rule guarantees the integrity of the treaty, and secondly, that only an integrally applied treaty may become efficient.

As to the assertion that the unanimity rule protects the integrity of the treaty the following must be stated.⁸ Treaty practice during the era of the unanimity rule clearly shows that there were seldom objections to reservations. The absence of objections does not mean that reservations have always been of minor importance, concerning only procedural and technical matters, as is the case with regard to postal and telecommunication conventions.⁹ Reservations to the 1899 and 1907 Hague Conventions on the laws of war as well as the 1949 Geneva Conventions on the humanitarian law of war show that substantive provisions of major importance may be affected. Most of these reservations were presented at the moment of signature and were not objected to by the other states signing the conventions.¹⁰ The nature and amount of the reservations were believed to have largely encroached on the integrity of the conventions.¹¹ Against the view that the unanimity rule was necessary to safeguard the integrity of the treaty speaks the fact that the unanimity rule was widely held to contain a presumption of implied and tacit acceptance. Where reservations were affixed to signatures, and other states signed at the same moment without commenting on the reservations, it was considered to be an implied if not express acceptance of the formulated reservations.¹² The situation was similar in those cases where there was drawn up a *procès-verbal* of deposit of signatures or ratifications by the depositary and this was signed by the other states having deposited their signatures or ratifications without making any reference to the reservations that had been affixed to signatures or that were mentioned in the instruments of ratification.¹³ Implied acceptance of a weaker kind was present in the case where the signing did not occur at the same moment but could be undertaken within a certain period, or without any time limit, with regard to all reservations that had been priorly communicated to the depositary. This was naturally also the case with instruments of ratification that were deposited subsequent to other instruments of consent comprising reservations.¹⁴ Tacit acceptance proper was present in the case where reservations were communicated posterior to the signature, ratification or accession of a confronted state.¹⁵ This was the generally shared view in spite of the fact that there was no certainty about the exact period after which passivity was to

be construed as acceptance.¹⁶ Still, there were some that did not accept this broad rule of tacit acceptance which was more in line with the central, original idea of integrity.¹⁷

The assertion that an integrally applied treaty is a treaty that is going to operate in the most efficient and satisfactory way is based on the assumption that the result of treaty negotiations as expressed in the finally adopted treaty text constitutes an ideally balanced system of rights and obligations, where the negotiating states have received and given the same amount of benefits and concessions.¹⁸ Reservations would be a threat to this harmonious compact, as they are usually believed to limit the obligations under the treaty of the reserving state thereby affecting the rights of the other parties. As far as one is ready to consider a treaty to be the optimal balancing of conflicting interests, any reservation may tip the scale to the disadvantage of the confronted states. Only if applied without modifications would the treaty operate to the equal benefit of all the parties fulfilling its very purposes. However, there are no real safeguards for an unaltered body of norms to operate in a satisfactory way. Firstly, opinions of the negotiating states may vary about how well-balanced a system of norms providing rights and obligations may be. Owing to the majority rule for the adoption of treaty texts we have to acknowledge the possibility that the negotiating states having been outvoted in the deliberations on specific questions will not be satisfied with the outcome of the negotiations and will not recognize that there is a just balance of rights and obligations with respect to all parties.¹⁹ Reservations may well be the simple expression of discontent with the outcome of the negotiations and the belief that the treaty does not present a balanced whole. Secondly, the case of the acceding states has been disregarded. These states have not had the possibility to propagate their views during the elaboration of the text and have them recognized by the treaty provisions. An acceding state can hardly be forced to hold that the treaty text provides an ideal regulation of the subject-matter. Finally, the treaty itself by envisaging amendments does accept the possibility of inefficiency or inoperation of certain of its norm.

The inefficiency of a treaty depends largely on external factors, which have nothing to do with the question of their integral acceptance. A party may not be able to realize the required changes of its internal legislation to bring it in accord with the treaty norms. Some states may feel obliged to present a reservation indicating this fact, others may deem it unnecessary. In both cases the treaty will not operate as previewed, but in the case of the reserving party the actual state of legal relations is easier to ascertain.²⁰

Behind the argument of integrity and effectivity one may discover the desire of the negotiating states (the more influential ones) to protect the result of the treaty negotiations. The unanimity rule provided a valuable tool to guard the drafters of a treaty from undesirable and unexpected alterations rather than safeguarding the original formulation of the treaty.²¹ The negotiating states as authors of a treaty seemed to believe that they ought to have a certain control over the fate of their creation. In so far as reservations have not encroached on their vital interests they have had no scruples in acquiescing in far-reaching reservations. This is corroborated by the fact that there was less aversion to

reservations that were presented at the moment of collective signing than to those made later in connection with the individual ratifications, and especially with the accession of states having been invited to participate in the treaty by its originators.²²

4.3 THE PRACTICAL ARGUMENT FOR A LIBERAL REGIME: UNIVERSAL PARTICIPATION

The opponents of the unanimity rule and the proponents of a more liberal attitude towards reservations considered that the former was debarring states from becoming parties to treaties that were of universal significance. All states should have the right to participate in conventions creating norms of general international law and which were therefore of interest to the whole of the international society.²³ The argument of universal participation in treaties of general importance was most popular among socialist and Afro-Asian states, whose participation in the negotiations and the preparatory work of general conventions had not been self-evident.²⁴ Their contention was that the unanimity rule would too easily hinder a reserving state from becoming a party to a treaty. A negotiating state or a party to the treaty would have an unlimited right to deny the participation of a reserving state irrespective of how minor the reservation.²⁵ This view was upheld by the ICJ in its advisory opinion of 1951. The Genocide Convention belonged to the group of general conventions where a wide participation was crucial and where it was not advisable that the institution of objections to reservations should be allowed to obstruct participation.²⁶ The ICJ was not ready to assume a general right of participation in all multilateral treaties, but stated that this could only be decided upon after a thorough analysis of the circumstances under which the convention was drafted.²⁷ The question of universal participation in general multilateral treaties was discussed during the elaboration of the Vienna Convention. There were proposals to introduce the concept of general multilateral treaties into the Convention.²⁸ This concept of general multilateral treaties would imply the right of every state to enter into such a treaty irrespective of it being disliked by another state which was also a party to the treaty. Especially with regard to the GDR it was a major task to prove the existence of the right of every state to participate in general multilateral treaties.²⁹ Against such a right of participation was held the freedom of every state to conclude treaties. The freedom of a state to conclude treaties consisted in the freedom to enter or not to enter into treaty relations with other states, the freedom to choose one's treaty partner, the right to terminate a treaty, etc.³⁰ The freedom to choose a treaty partner was regarded as inconsistent with the right to participate in a treaty. The notion of treaty freedom clearly favours those states that have traditionally been invited to participate in conferences or organs where treaties are negotiated.

The question of the right of participation in treaties was the object of lengthy discussions both in the ILC and the Vienna Conference. This debate started with the proposal of the Drafting Committee of the ILC in 1962 to introduce the notion of 'general multilateral treaty', that is a treaty concerning general

norms of international law or dealing with matters of general interest to states as a whole.³¹ Attitudes towards this notion were divided among the states participating in the preparatory work. One group of states advocated an unlimited right to participate in treaties that had a general character. Another group of states, which did lose some of its adherents during the negotiations, spoke clearly against any right of participation in general treaties.³² An intermediate view was not negative towards the notion of general multilateral treaties as such, but was not in favour of introducing this concept explicitly into the Vienna Convention because of the impossibility of arriving at a satisfactory clarification by definition.³³ The last view was the one to prevail at the Vienna Conference.³⁴ The outcome of the discussions was largely influenced by the dispute over the membership of such states as the GDR, the People's Democratic Republic of Korea and the Democratic Republic of Viet Nam in international organizations and international conferences. Had the deliberations in this matter taken place at a later date, the outcome may well have been different.

The positive view with regard to the right of participation in general multilateral treaties was largely concurring with a liberal attitude towards reservations. Treaties introducing international legal norms of general significance ought to be open to all states, as their satisfactory operation requires as wide an adherence as possible.³⁵ This was purportedly achieved by taking a liberal view of reservations providing a principal freedom to enter a treaty subject to reservations.³⁶

The universality argument is based on vague premises. The propagators of the universality argument have never tried to prove the tenability of their assertion. Simultaneously with the implementation of the unanimity rule within the treaty system of the League of Nations and the United Nations, the American states followed a permissive policy towards reservations in their internal relations.³⁷ No comparative study on the relative amount of commitments to the League of Nations conventions and the Pan-American conventions has been undertaken.³⁸ What is of interest is that not all of the members of the ILC representing the Western hemisphere were willing to advocate the general validity of the Pan-American flexible reservation regime. Amado (Brazil), Alfaro (Panama) and Córdova (Mexico) were openly critical towards the Pan-American regime. They did not believe that Pan-American conventions had experienced a wider participation.³⁹ A certain number of Pan-American treaties has never entered into force in spite of a liberal reservation regime. This was the case with the 1902 Treaty for the Extradition of Criminals and for Protection against Anarchism, the 1928 Convention on the Pan-American Union, the 1948 Economic Agreement of Bogotá, the 1943 Convention on the Inter-American University and the 1975 Protocol of Amendment to the Inter-American Treaty of Reciprocal Assistance.⁴⁰

The value of a comparative study would be doubtful. The difficulties in achieving a wide participation in treaties may well grow progressively with regard to the growing number of states that are supposed to enter the treaty. Universal conventions may be in a different situation than regional agreements. Furthermore, the number of commitments depends on a combination of factors, the rules on reservations being only one. The effect of the reservation regime cannot be easily isolated from that of the others.

One may ask if there can be detected at all a correlation between the gradual abandoning of the unanimity rule since the 1950ies and a wider adherence to multilateral treaties. It does not appear to be so. The quantitative study by Gamble mentioned earlier which concerned treaties that had entered into force between 1919 and 1971 shows that there has been no significant increase in the participation in treaties, taking into consideration the increasing number of states having become members of the international community.⁴¹ Even though the Vienna Convention did not enter into force until January 1980, the unanimity rule had lost its character as a binding rule during the years that succeeded the advisory opinion of the ICJ.⁴² In fact, the limited adherence to general multilateral treaties is considered very much to be a problem of present day international relations. The United Nations General Assembly has been studying the possibilities of facilitating the elaboration and entry into force of such treaties since its 32nd session in 1977, the deliberations have not yet come to a close.⁴³ There have also been other efforts to cope with the problem of delays in the entry into force of treaties.⁴⁴

Finally, the propagators of the universality argument have ignored the possibility that reservations may result in a disinterest by some of the other states to participate in the treaty.⁴⁵

The universality argument has been invoked by those who have contended that every state ought to have an absolute right to enter into a treaty with a reservation irrespective of any express acceptance or objection by another contracting state. The universality argument was equally used by those favouring the flexible Pan-American rule, which does admit both the freedom to formulate a reservation and the freedom to reject such a reservation.

4.4 THE THEORETICAL ARGUMENTS FOR A LIBERAL REGIME

4.4.1 The doctrine of 'absolute sovereignty'

The sovereignty doctrine was launched in connection with the reservations to the Genocide Convention.⁴⁶ Behind this doctrine stood the socialist states, some of whom had presented reservations to the Genocide Convention.⁴⁷ Before this incident the question of reservations had not been of major interest among writers from the socialist states. Among Soviet writers who dealt with the reservation question before 1951, Kozhevnikov, Polents and Durdenevskii shared the general view that reservations had to be consented to by all the other interested states in order to become operative and binding on the other parties.⁴⁸ The first official views expressed during the years 1950 and 1951 indicated a clear switch to an opposite viewpoint.⁴⁹ Soviet writers in international law were ready to follow this new orientation. Borisov, Gubin and Filippov elucidated the doctrine of absolute sovereignty, according to which a state had an undisputable right to make reservations it considered adequate and necessary.⁵⁰ It was inherent in the sovereignty of each state to participate in treaties on the most advantageous conditions possible. Reservations were now conceived as a means by which a state could protect itself against the disparity of unequal treaties which had been dictated by more powerful states taking part

in the negotiations, who were able to mobilize the necessary majority to have their interests satisfied by the provisions of the treaty.⁵¹ It was further said that reservations had not only the function of safeguarding the vital interests of the reserving state, but also to protect the sovereignty of friendly nations against the aspirations of certain states towards world hegemony. It was therefore consistent to contend also that reservations to treaties between socialist states were unthinkable.⁵²

According to the rule of an absolute right to make reservations based on the sovereignty argument, reservations achieved the character of unilateral legal acts. A treaty did enter into force between a reserving and a confronted state irrespective of any opposition from the latter. Reservations were to become valid from the date they were communicated, or from the date the treaty entered into force if this was to occur later, without having to wait for any form of acceptance by the other states concerned. The question was whether the sovereignty doctrine held that a reservation was opposable against all parties, both accepting and objecting states alike, and therefore absolutely and unrestrictedly binding. Apparently the socialist states at the time of the Genocide dispute considered that a reservation was binding with regard to all other parties and that objections were of no effect.⁵³ The government of the Ukrainian Soviet Socialist Republic in its written statement dated 20 January 1951 to the ICJ asserted that, "Submitting of reservations has consequence that treaty is valid between that State that introduced the reservation and other States signed the treaty *except for that part concerning which reservation was made*".⁵⁴ (emphasis added). Similar statements were delivered by Byelorussia and Romania.⁵⁵ These states only had what we are later to call the 'excluding' type of reservations in mind. The Czechoslovak statement had a more precise formulation when it declared that the reserving state, "*devient partie au traité sans égard au fait, si l'une des autres parties contractants a fait une objection à cette réserve, le traité étant en vigueur entre les parties contractantes dans le cadre donné par les réserves formulées*" (emphasis added).⁵⁶ This formulation could also provide room for reservations of the 'modifying' kind.⁵⁷

The same view was advocated during the discussions of the United Nations General Assembly. The delegate of the Soviet Union, Morozov stated categorically that a reservation would become valid with respect to all contracting parties.⁵⁸

As the propagated rule of an absolute right of reservation forced the confronted states to submit to the exclusion (or alteration) of certain treaty norms against their will, it naturally met with heavy criticism. The rule did protect the sovereignty of the reserving state while at the same time intruding on the sovereignty of the confronted states, thus contradicting the very principle of sovereign equality as advocated by the UN Charter.⁵⁹ This was because reservations intending to replace a system of norms as expressed in the original text of an adopted treaty, by another system of norms as expressed by the treaty in conjunction with the reservation, had to be based on common agreement as to each of the treaty norms.

In Soviet legal doctrine it was first Borisov and further the Juridical Dictionary and Durdenevskii which were ready to admit for the disapproving

states a right to object.⁶⁰ Borisov and the Juridical Dictionary considered that the treaty does not become applicable between reserving and objecting state.⁶¹ Kozhevnikov argued that a contracting state has also a sovereign right to object and that the treaty therefore would not be in force in its relations with the reserving state.⁶² Durdenevskii developed this view further. An objection would usually not hinder the treaty from applying between reserver and objector, but only exclude those parts affected by the reservation from applying. He admitted however that an objector state should have the right to opt for complete elimination of treaty relations.⁶³ He was thus not following the official rigid view which opposed categorically the rule as expressed in article VII of the Convention on Political Rights of Women. Filipov and Shurshalov equally accepted an option for the disapproving state not to apply the relevant provisions or the entire treaty.⁶⁴ Kuznetsov, criticizing the Pan-American so called maximum effect rule, shared the view of Durdenevskii.⁶⁵ A similar view was later expressed by Tunkin.⁶⁶

We thus find that it was in the first hand the Soviet legal writers which made allowance for the consensual character of international legal commitments.

In connection with the elaboration of the reservation clause to the 1961 Single Convention on Narcotic Drugs the Soviet government followed the view as earlier expressed in Soviet legal doctrine and recognized not only the right for disapproving states to object but also the right to qualify one's objection so as to eliminate all treaty relations with the reserving state.⁶⁷ During the deliberations on the law of treaties within the ILC the socialist states came to accept that a distinction had to be made between the case where a reservation was accepted and the case where it was objected to. In the first case, the treaty was to apply as modified according to the terms of the reservation. In the second case, the treaty was to apply but with the exception of the provision or provisions to which the reservation referred.⁶⁸ If a disapproving state considered the reservation a very grave one it would have the right to deny any treaty relations with the reserving state.

Although Soviet legal doctrine and official views like to underline that the right to present reservations derives from state sovereignty, they do not any longer conceive this as an absolute right which may be enforced against disapproving states. The doctrine of 'absolute sovereignty' was in the end propounded for a very short period and was superseded by a more moderate conception of the sovereignty principle.⁶⁹

4.4.2 The argument of the consensual nature of treaty commitments

The Pan-American rule, also commonly called the flexibility rule, did not embrace the idea of absolute sovereignty that we find in the original position of the socialist states in connection with the *Reservations to the Genocide Convention* case, although the Havana Convention on the Law of Treaties speaks of reservations as "acts inherent in national sovereignty".⁷⁰ This rule is founded on the presumption that reservations in the same way as the adopted text are intended to bring about valid norms that bind the states concerned and that they therefore should, just as proper treaty norms, be based on common consent. The Pan-American rule must thus make a distinction between the

presentation of a reservation and the entry into operation of that reservation. It is more correct to speak of a liberty to formulate reservations rather than a right to make them. To this liberty corresponds the liberty of the other states to accept or object to reservations.⁷¹ Each confronted state may make use of this liberty independently from the other confronted states. The measures taken by one confronted state do not affect the position of another confronted state. This individualistic appraisal of reservations has been said to lead to a fragmentation, a bilateralization of the legal relations within a multilateral treaty.⁷² Some writers have believed this to result in considerable inconveniences.⁷³ A single reservation may create different relationships between the participating states. Between all the non-reserving states a norm system corresponding to the terms of the adopted text will become effective. Between a reserving and a confronted state which has accepted the reservation a modified norm system will be introduced. Between a reserving and an objecting state the relations will not be governed by the norms expressed in the adopted treaty text or will only be governed by those norms to which the reservation does not relate.⁷⁴

The Pan-American rule had the effect of making the reserving state a party to the treaty provided that at least one contracting state had accepted the reservation. If all contracting states object to the reservation the reserving state will not enter into any legal relations under the treaty if it decides to uphold the reservation.⁷⁵ Theoretically seen the regime could present some grave problems. If all parties to a treaty already in force object to a later ratification containing a reservation, the actual status of the reserving state may be difficult to determine. What happens if other states later ratify or accede to the treaty? May their silence be construed as a tacit acceptance having the effect of making the reserving state a party to the treaty? Can it be assumed that a state consenting at any later time has knowledge of an instrument of consent subject to a reservation rejected by all the parties at the time of its presentation? Very much depends on whether the instrument of consent containing the reservation is as such invalidated by the unanimous opposition by the present parties, and the reserving state is thus excluded from participation in the treaty, or if the reserving state is formally registered as a party to the treaty but the entry into operation of the treaty for this state is suspended for an indeterminate time.⁷⁶ In the treaty practice amongst American states this has never occurred. The situation now described may be probable only in cases where the treaty enters into force only after several ratifications or accessions. A considerable number of Inter-American treaties enter into force with the second ratification.⁷⁷ The new rules of the OAS on the legal effect of reservations and objections make it even more impossible for such a situation to arise as they, in accordance with the Vienna Convention rules, ascribe simple objections only the effect of excluding the provision designated by the reservation.⁷⁸

4.5 REASONS FOR REJECTING THE UNANIMITY RULE

To sum up, the rule of unanimous acceptance succumbed due to the inherent defects in the arguments by which it was justified. The analogy between treaty

and contract, as well as between reservation and counter-offer, could not imply the unanimity rule. This would have only been possible by making complementary assumptions, which in fact were never displayed. Nor can the argument of integrity and efficiency be taken at face value. It seemed to work more as a controlling device for the architects of the treaty instrument. Construing inaction by the confronted states as tacit acceptance of a reservation was inconsistent with considerations of integrity and effectivity.⁷⁹

The implementation of the unanimity rule encountered practical difficulties, a fact that as such could not undermine the unanimity rule, because these problems could have been solved. Firstly, there was the problem of determining which states would be entitled to make their opinion known. This question was elementary as one single state could by its objection exclude a reserving state from participating in the treaty. Secondly, the unanimity rule was considered as largely unegalitarian, giving one single state the power to prevent a reserving state from entering a treaty even against the wish of all the other parties.⁸⁰ Thirdly, no general rule had developed as to the period after which passivity was to be considered as tacit acceptance. This was creating uncertainty for an unlimited time. It was not easy to determine what was to be the reasonable lapse of time after which one would be justified in construing silence as acceptance.

Although the arguments for the alternative rules on the absolute right of reservations and of flexibility had their defects, they were devastating in their criticism of the unanimity rule. The criticisms that they presented received slowly but steadily a wider and wider endorsement.

CHAPTER 5

THE CRYSTALLIZATION OF THE CONCEPT OF RESERVATION

Any attempt at legal regulation forces the legislator or the drafter of a treaty to indicate the phenomenon that is to become the object of regulation.¹ How does one identify the state of affairs, be it acts, events or situations, which are to be governed by prescriptions? What are the criteria which determine if a phenomenon does or does not fall under a regulation? What are the actual distinguishing criteria of those statements that are said to be reservations and governed by the unanimity rule, the Pan-American rule or the Vienna Convention regime?

It must be admitted that reservations have for a long time remained an obscure phenomenon, only slowly crystallizing into a firmer concept. As long as the need for a regulation of reservations was not felt to be pressing, attempts to elucidate the concept of reservation remained few. Even the first official undertaking within the League of Nations to regulate the formulation of reservations was not based on any thorough analysis of the reservation problem. The studies within the League of Nations and the Pan American Union did not clarify what reservations really are. Works by individual writers were in this respect more ambitious and various definitions were propounded. The problem was that international jurisprudence was faced with a multivariar agglomeration of different concepts of reservation. Behind the abundance of these early conceptions of reservation one may discover two distinct approaches. One was of a more descriptive nature trying to achieve a broad definition that would cover all the various statements that had at one time or another been designated as reservations. The other and more current approach was striving towards a more independent definition of a stipulative kind, not intending to simply describe factual linguistic usage by states.²

An illuminating example of the first approach is provided by the definition given by Genet. This definition is so broad that it embraces all statements that had been labelled reservations:

*“Les réserves seront des déclarations antérieures, concomitantes, ou postérieures à un instrument diplomatique international émanées de l’un ou des tous les Etats signataires, et restreignant, dans une mesure plus ou moins grande, qualitativement aussi bien que quantitativement, mais toujours nettement déterminée, l’adhésion que cet Etat ou ces Etats appartiennent à la convention à conclure ou conclue.”*³

With this broad definition Genet hopes to grasp all the various “reservations” that he has classified according to three aspects: the chronological appearance of reservations, their nature and their scope. The first group of reservations consists of the following subcategories: reservations presented during negotiations, during the conclusion of the treaty (signature and ratification) and after the conclusion (accession and adhesion). The second group

consists of the so-called reservations of ratification as well as declaratory, interpretative, anticipated, constitutional, positive and open reservations. The third group again consists of general and unilateral reservations.⁴ A broad but less specified definition is presented by Miller:

“a reservation to a treaty may be defined as a formal declaration relating to the terms of the treaty made by one of the contracting Powers and communicated to the other contracting Power or Powers at or prior to the delivery of the instrument of ratification of the declarant.”⁵

The definition appears to cover all statements that in any way “relates to the terms of the treaty”.

The other approach of striving to introduce an independent concept of reservation is by far the more prevailing. The crucial quality of reservations is that they change the legal effects. The changing effect of reservations is either conceived as the “exclusion”, “restriction” or “modification” of certain prescriptions embedded in the treaty text. Anzilotti considered that:

“... le mot réserve sert à indiquer une déclaration de volonté par laquelle l'Etat, tout en admettant le traité dans son ensemble, exclut de son acceptation certaines dispositions déterminées par lesquelles il ne sera pas, pour autant lié.”⁶

The definition of Anzilotti mentions only the ‘excluding’ effect of reservations. Writers who did mention only the ‘excluding’ or only the ‘limiting’ effect of reservations were Baldoni, Hudson, Pomme de Mirimonde, Accioly and Guggenheim.⁷ However, there were numerous writers that did admit the possibility of reservations having a ‘modifying’ effect on treaty norms. Holloway, Hyde, Kraus, Podestá Costa, Rousseau and Scheidtmann, to name just a few, advocated concepts that related to the ‘modifying’ effect of reservations, with or without referring to their ‘excluding’ effect.⁸

A category of definitions which seem closely related to the afore-mentioned ones, but which in certain borderline cases may lead to different results, are advanced by Scelle, Khadjenouri and Kappeler.⁹ According to their view the characteristic feature of reservations is that they generate norm systems that derogate from the “normal” or “general” norm system. Reservations bring about a situation where parallel to the “normal” or “original” norm system there arises one or more specific norm systems, which differ from the principal norm system. This way of conceiving reservations will lead to different results in cases where all participating states present different reservations. We are now facing a situation where there is a set of different norm systems. These do not exist side by side with any “general” or “original” norm system as represented by the adopted treaty text, as this had not had the chance to become operative. In such a situation where all the participating states propose reservations the former conceptions would still treat them as reservations, whereas the conception of parallel norm systems would not be able to do so. No main norm system coexists with one or more diverging systems. The latter conception would not find it possible to accept reservations to bilateral treaties.¹⁰

Certain writers have also accepted that reservations may bear upon the interpretation of treaty provisions, a question which will be discussed in connection with the so-called interpretative declarations.¹¹

Sometimes we find that a statement will require a further supplementary feature in order to qualify as a reservation. Reservations are presumed to constitute a clear condition for the participation of the reserving state in a treaty. Such is the case with the 1935 Harvard Draft on the Law of Treaties:

"... , a 'reservation' is a formal declaration by which a State, when signing, ratifying or acceding to a treaty, specifies as a *condition* of its willingness to become a party to the treaty certain terms which will limit the effect of the treaty in so far as it may apply in the relations of that State with the other State or States which may be parties to the treaty." (emphasis added)¹²

The 1959 Draft on the Foreign Relations Law of the United States drawn up by the American Law Institute defined:

"A reservation is a *qualification* by a party to its assent to an international agreement, made before the agreement becomes binding upon that party, and intended to change its legal effect." (emphasis added)¹³

Other individual writers such as Kappeler and v. Crayen held reservations to be essentially explicit conditions.¹⁴ Reference to the quality of reservations as being basically conditions for one's final consent to a treaty could be found in early proposals within the ILC for a definition on reservation, however, this was later dropped.¹⁵ The conditionality of reservations has lately gained new significance. It has been invoked as a means of determining when an interpretative declaration could be considered to be a reservation and when only a simple unilateral interpretation.¹⁶

The view that reservations are formal statements that can only be presented at specific moments was but slowly accepted as something that had to enter into the definition of reservation. Miller's and Genet's definitions would permit that reservations may be introduced freely at any time before (or after, according to Genet) giving one's definitive formal consent to the treaty. The necessity of limiting the presentation of reservations to certain fixed moments became generally recognized in order to facilitate the registration and communication of reservations.¹⁷

This brief outline shows the richness and variety of definitions with the help of which publicists tried to penetrate into the complexities of reservation practice. Naturally, legal writers were influenced by each other when trying to elaborate satisfactory definitions. They could be grouped together according to which basic ideas they thought worthwhile accommodating in their definitions. So we find the idea of parallel norm systems to be popular among francophone writers influenced by the writings of Scelle. It may be more than a simple coincidence that writers in the German language share the view that interpretative declarations constitute reservations, whereas Anglo-American writer as a rule do not consider such statements to be true reservations.¹⁸

The dispute that arose in connection with the reservations to the Genocide

Convention was the crucial incident that clearly showed the absence of a common concept of reservation and which materialized the need for an authoritative definition on the basis of which a reformulation of the rules on reservations could be achieved.¹⁹ The ILC began its investigation of the reservation problem by collecting and analyzing the various definitions that had been proposed by legal writers.²⁰ On the basis of this material the rapporteurs on the law of treaties started to elaborate a definition that could be inserted into the future Convention on the Law of Treaties. Common to all definitions by the rapporteurs, Brierly, Fitzmaurice and Waldock, was that reservations were supposed to "exclude" or "vary" the legal effects of a treaty.²¹ The proposals of Fitzmaurice and Waldock also included an indication of those occasions on which reservations were deemed to be formulated. The lengthy and prolix definition that Waldock had formulated on the basis of Fitzmaurice's prior draft was trimmed down by the ILC and given a more stringent formulation:

" 'Reservation' means a unilateral statement made by a State when signing, ratifying, acceding or accepting a treaty whereby it purports to exclude or vary the legal effect of some provisions to the treaty in its application to that State."²²

The definition of the Final Draft of the ILC experienced only slight changes:

" 'Reservation' means a unilateral statement, *however phrased or named*, made by a State when signing, ratifying, acceding to, accepting or *approving* a treaty, whereby it purports to exclude or vary the legal effect of certain provisions of the treaty in their application to that State."²³ (emphasis added)

The major amendment to the definition was considered necessary to stress the importance of determining the nature of a statement on the merits of its effects on the operation of the treaty and not on the basis of the designation that the declaring state happens to use.²⁴

In spite of a certain number of proposals for amendments at the Vienna Conference of 1969 to article 2 containing the definition of 'reservation', the ILC Draft Articles on the Law of Treaties were finally adopted subject to only some minor drafting changes. The term 'vary' for example was replaced by the term 'modify' in order to make this part of the Convention better conform to the terminology used in other parts of it, where the term 'modify' had already been used.²⁵

CHAPTER 6

THE VIENNA CONVENTION DEFINITION OF 'RESERVATION'

6.1 LEGAL DEFINITIONS

Having a concept is to be acquainted with the meaning of a word or an expression.¹ That is to say we know how to use the word or how it is being used. Through the act of defining we either state what, in everyday language, is the generally accepted meaning of the word or we propose a certain meaning to be given to a word. This may consist of giving a more precise meaning to an old, already familiar word or of inventing a new word and determining its meaning. In the first case the definition describes the ordinary uses of a word and is therefore called *lexical* and may either be a true or false proposition about actual usage. Descriptions of actual usage are provided by lexica and dictionaries. In the latter case the definition prescribes a new or modified use and is called *stipulative*.² Once a word has received a more or less fixed meaning it becomes a term. A term always forms part of an interrelated set of words, a vocabulary.³

Parallel to our ordinary language we encounter various technical languages which operate in specific realms of human activity and are characterized by greater preciseness than ordinary language. Legal language is such a technical language, the aim of which is to convey information about norms and facilitate their implementation. It goes without saying that legal language requires a more precise vocabulary than that which is provided by ordinary language. Without a certain degree of precision the legal system would not operate satisfactorily. The need for precision is satisfied by introducing a certain amount of stipulative definitions, which are harboured in legal instruments such as statutes and treaties. These definitions will commit and guide those persons who are affected by the legal norms, the ordinary citizens and associations of individuals as norm-receivers and individual officials and collective organs as norm-apppliers. Although it has been under dispute whether stipulative definitions are themselves binding, it is here submitted that legal definitions have such a force.⁴ As will be shown later certain treaties prohibit reservations to the stipulative definitions introduced by the treaty, which clearly demonstrates their binding nature.⁵

Through the standard type of definition, the word to be defined, the *definiendum*, is replaced by the *definiens*, a combination of usually simpler words the meaning of which is assumed to be clear. In legal language, not being a formalized language, the elucidation of the *definiens* has to be effected by resorting to other words taken from ordinary language.⁶ It is important to point out that the words chosen for the *definiens* are assumed to be plain. When doubt arises as to the correct understanding of some expression in the *definiens*, one way to solve the dilemma would be to look for its lexical definitions in some authoritative dictionary, such as Webster's, the Robert, the

Diccionario de la Real Academia, etc.⁷ As the use of legal instruments for ascertaining the legal norms that are to be implemented takes place in an ever-changing world, stipulative definitions will constantly be put to the test. Frequently “unproblematic” expressions introduced into the *definiens* reveal their impreciseness at a later stage. The framers of a legal instrument may, of course, be aware of this deficiency of words used in the *definiens*. In such cases they may forestall this by introducing a new stipulative definition, which will specify the meaning of those doubtful words in the *definiens*. As legal definitions will always fall back on words and expressions taken from ordinary language, impreciseness can never be completely avoided by means of consecutive, complementary definitions. Any effort to achieve completeness and conclusiveness by means of definitions is deemed to fail. Problems are only put off for the moment, they are likely to emerge later on. The impossibility of arriving at exhaustive definitions is the outcome either of our deficient knowledge or the impossibility of agreeing on a desirable end state, the achieving of which would constitute common aims for action. Our lack of knowledge, or our relative ignorance of fact as Hart calls it, relates either to the state of affairs that was, that is or that will be.⁸ Would our knowledge be complete, then we would be able to construct an ideal language, all-embracing and complete. The deficiencies of definitions have also been believed to result mainly from the limitations of our language. We are unable to find words and expressions which would in an absolutely unequivocal manner indicate and delimit the phenomena that we intend to make the object of regulation.⁹ The above-mentioned assumption could also be stated the other way around. If we could construe an ideal language in the spirit of Platon we would require full insight into, and full control of, the world.¹⁰

Ordinary language may be felt to be dynamic and ever-changing, flowing with the stream of constantly succeeding social events. Legal language expressing prescriptions is, on the other hand, characterized by rigidity as it imposes a set of norms on the reality of smooth transitions. Law forces a dichotomous pattern on social life distinguishing between matter regulated and matter not regulated, between human conduct ordered or prohibited and human conduct permitted. However, because legal language in the end has to rely on the impreciseness of everyday language this provides an opportunity to evade the full and often absurd implications that may follow from such a rigid pattern. The impreciseness of words and expressions is therefore not simply a disadvantage but has also a salutary function.¹¹ The impreciseness of terms and expressions guarantees legal instruments, both with regard to their norm formulations and their definitions a certain malleability, which helps them to remain viable, i.e., applicable under changing circumstances. How far a legal text may be able to meet the challenges of a changing world must be left to estimation in each individual case. At a certain point one may feel that widening the use of a term to cover certain new phenomena will violate our sense of correct language. In such a situation there will be good reasons to alter the wording of the legal instrument.

The method of providing consecutive legal definitions is not infrequently resorted to in international legal instruments. An example may be drawn from the Vienna Convention on the Law of Treaties. The Convention enumerates

various cases of invalidity of treaties in part V section 2. One instance of invalidity may be invoked where a provision of internal law regarding the competence to conclude treaties is violated. This concept is elucidated in article 46 of the Vienna Convention:

“A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of its internal law regarding the competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.”

The word “manifest” introduced into the definition was thought to be too imprecise by the drafters and therefore in need of a further clarification.¹² A complementary definition of “manifest violation” is found in paragraph 2 of the same article:

“A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.”

It is not difficult to see that the consecutive definition in its turn presents words and expressions which are by no means clear. What is actually meant by “objectively evident”, “normal practice” and “good faith”? Of course, one could introduce a third and fourth generation of definitions, but one will never be able to avoid choosing new words that are equally imprecise. The legislator or framer of a legal text has to stop short at some stage and leave further clarification to the future when the relevant provisions are to be applied to concrete cases.¹³ The question remains open whether it would be possible and advisable to apply the norms on invalidity to a radically new state of affairs not foreseen by the drafters of the legal text.

6.2 SOME GENERAL REMARKS ON THE CONCEPT OF RESERVATION IN THE VIENNA CONVENTION

In its introductory article 2, the Vienna Convention provides definitions of a number of terms used in the convention. Of these the term ‘reservation’ is of primary concern. It is defined in article 2(1)(d) as:

“... a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State;”

This definition has received a wide adherence among international lawyers, who consider it to be an authoritative statement of how the term ‘reservation’ should correctly be used. There has nevertheless been some criticism of this definition as still being ambiguous, leading to proposals for alternative definitions.¹⁴ Later drafts and adopted conventions covering other parts of treaty law have however reiterated the substantive parts of this definition.¹⁵

Though the Vienna Convention has its defects it has at least eliminated the rich variety of definitions proposed by the international legal writers of earlier times. Undoubtedly, the Vienna Convention has helped to make the use of the term 'reservation' more uniform. Any study of the reservation problem will now have to take this definition as a starting point.¹⁶

There were many opinions as to which title would be the most suitable for article 2 providing for elucidations of the central terms used in the Vienna Convention. The drafters were finally not willing to designate their clarification of the terms, as definitions. Article 2 has been titled "Use of terms" and not "Definitions" as was done in earlier drafts of the ILC. The motive behind this change was not to prejudice the question of whether the terms used in the Vienna Convention could have another meaning in other circumstances. Thus, the Vienna Convention does not answer the question whether there may exist different concepts of reservation.¹⁷

A closer look at the preparatory work suggests that some of the drafters had a rigid and settled opinion on the nature of definitions.¹⁸ They seemed to have in mind only a certain type of definition as being a proper one. Such proper definitions would indicate the sufficient conditions that have to be present in order that, for example, a certain phenomenon could be called a 'reservation'. All phenomena sharing the same combination of characteristics, and only these, could be justly covered by the term. Such absolute definitions would call for universal validity, because they would state absolute truths about intrinsic qualities in the designated phenomena.

The considerations that lay behind the change of the title to article 2 reflect too narrow an understanding of the concept of definition, based on the essentialist theory of definitions. However, the heyday of the essentialist theory passed long ago, having given way to the prescriptivistic and linguistic theories.¹⁹ There is absolutely nothing in the notion of stipulative definitions that would imbue them with universal and absolute validity. The Vienna Convention is very clear on this point as it states that the terms under article 2 are to be used as indicated "for the purpose of the present convention"²⁰. These doubts of certain of the participants in the preparatory work have not been shared by international lawyers commenting upon the Vienna Convention rules and understanding article 2 as providing definitions.²¹

The actual reason for the dispute over the advisability of using the term 'definition' as a title to article 2 was mainly due to the difficulties in settling the concept of treaty as an international agreement between states. Some of the members of the ILC feared that this would entail that treaties were not possible in those cases where some or all of the entities wanting to regulate their relations on a formal basis were not states.²² Such a view reflects an overprudent attitude.

The Vienna Convention definition of reservation may be referred to the class of analytical definitions, because it breaks down the concept of reservation into various constituents.²³ It strives to indicate the criteria that have to be present before we may denote a class of phenomena by a single term. As an analytical definition it would be considered to be an example of the classical *per genus proximum et differentiam specificam* definition. Reservations would belong to the class of unilateral statements made by states when signing, approving or

acceding to a treaty (*genus proximum*). They are distinguished from other unilateral statements presented at these moments, by their quality of 'excluding' or 'modifying' the legal effects of certain provisions of the treaty in their application to that state (*differentia specifica*).²⁴

The first part of the definition, the *genus*, reveals a denotative component.²⁵ This denotation would be complete if the enumeration of the occasions when such statements may be presented was exhaustive, which at first glance would seem to be the case. It would appear that statements produced at other moments would not qualify as reservations. The Vienna Convention definition seems to be narrower than the concepts presented by early writers such as Miller, Genet and Owen.²⁶ But it is doubtful if the enumeration of moments when reservations may be presented is complete and absolute. It is more correct to consider the temporal requirement as facultative. The denotative component of the Vienna Convention definition is not complete. A treaty may provide for the possibility of formulating a reservation at a moment other than that of signature, ratification or accession of a state to the treaty. A consenting state may have the liberty to formulate a reservation at any time before the act of ratification or accession. This formula has been used in the 1960 Convention on Third Party Liability in the Field of Nuclear Energy, the 1954 Convention Concerning Customs Facilities for Touring and the 1961 Hague Convention on the Protection of Infants.²⁷ Treaties that provide for their continuation in force for another specified term, if not denounced, may permit the formulation of new reservations before the beginning of each new term. Such a solution may be appropriate with regard to treaties establishing procedures for disputes settlement.²⁸ It is also possible that a treaty permits the formulation of reservations at any time.²⁹

A reservation presented at signature has according to the Vienna Convention to be confirmed on ratification. Legal doctrine has been divided on the question whether such reservation had to be reiterated and legal practice does not give any guidance in this respect. It is thus submitted that the duty to confirm a reservation presented on signature is a case of progressive development.³⁰ Within the Council of Europe the rule was until 1980 that a reservation presented on signature did not have to be confirmed. Presently such confirmation is required.³¹

What is the legal situation in those cases where the treaty does not clearly limit the proposal of reservations to certain moments? Is the enumeration in article 2 of the Vienna Convention conclusive? Examples from the depositary practice of the UN Secretary-General touch upon this question. In a memorandum of 5 April 1976 from the Secretary-General to the Director of the Division of Human Rights in response to a number of questions that had arisen in connection with statements made to the 1965 International Convention on the Elimination of All Forms of Racial Discrimination it was held that a party that had not formulated a reservation at the time of ratification or accession was not entitled to present any at a later time.³²

A more recent case in the practice of the UN Secretary-General seems to have weakened the strict limitation as to the moments reservations may be formulated.³³ Here the decision to admit a reservation after ratification was even contrary to the letter of the relevant treaty, which clearly stipulated a temporal

limitation with regard to the type of reservations under consideration. France had already on 27 April 1936 acceded to the 1931 Convention Providing a Uniform Law for Cheques, without presenting the now relevant reservation. Article 1(2) of the Convention provides *inter alia* that reservations may be made under article 7 of Annex II to article 5 and 14 of the Uniform Law on Cheques (Annex I) only at the time of ratification or accession.³⁴ The French government was intending to include in its Finance Bill of 1979 certain provisions to minimize tax evasion that would curtail the freedom to endorse cheques. As reservations to article 14 guaranteeing the freedom to endorse cheques were only permitted at the time of ratification or accession, the French government was considering to denounce the Convention with the intention of acceding to it anew with the requisite reservations. Owing to the unwieldiness of such procedure the representative of the French government inquired about the possibility of employing a simpler procedure.³⁵ The Secretary-General who had not earlier been confronted with a similar case thought it possible and convenient for the French government to address a letter to him including the proposed reservation, together with an indication of the date from which the reservation was to take effect. The reservation would be communicated by him to the states concerned, and if there were no objections within 90 days the reservation would be considered to have taken effect.³⁶ The Secretary-General justified this decision by arguing that parties to a treaty may by unanimous decision amend the provisions of a treaty. In the instant case the non-objection of the parties could possibly be construed as a unanimous decision to amend the Convention so as to make article 1(3), which permitted certain reservations to be notified after ratification and accession, also apply to all those articles to which reservations according to the original terms of the Convention were only admitted at ratification or accession.³⁷ Or it could be construed as an agreement to make an exception from the rules of the Convention in the instant case of France without trying to introduce an amendment into the text of the Convention. As a further argument justifying his decision, the Secretary-General referred to another case where a similar solution had been reached. The Secretary-General of the Customs Cooperation Council received, on 21 December 1965, as the depositary of the 1960 Customs Convention on the Temporary Importation of Packings, a reservation by Switzerland more than two years after the Swiss ratification, in spite of the fact that article 20 of that Convention only admits reservations at the time of signing or ratifying for submission to the states concerned. As there was no objection from the parties the reservation was considered as accepted with a retroactive effect from the date the Convention became binding on Switzerland.³⁸

This procedure is remarkable taking into account the earlier categorical repudiation of any efforts to introduce reservations later than the date of ratification or accession. The readiness to give reservations a retroactive effect is especially bold. It is not to be denied that the terms of the treaty may be modified not only according to the formal requirements of the normal amendment procedure established by the treaty itself, but also due to the consistent and general practice among the parties.³⁹ The argumentation of the UN Secretary-General would seem to construe the alteration of the treaty system on even weaker grounds. To construe the non-reaction of the parties to the Convention

with request to the depositary as constituting an "amendment" to the 1931 Convention is going very far in assuming a general agreement on revision.⁴⁰ It would be easier to accept passivity as a general acquiescence in an exception to the treaty norm. The independent line of action followed by the UN Secretary-General is still more surprising as he has since the resolutions 598(VI) and 1452(XIV) concerning his depositary functions with regard to reservations strived to realize a very marked policy of prudence, trying to avoid measures that would have any legal consequences for the parties to a treaty when receiving various statements and notifying them to the other contracting parties.⁴¹

The solution must be understood as dictated by pragmatic considerations. A party remains always at liberty to accede anew to the same treaty, this time by proposing certain reservations. As the result will remain the same whichever of these two alternative actions one might choose it seemed simply more expedient to settle for the more rapid procedure in spite of certain fundamental doubts. In the instant case there was no opposition, and even one explicit acceptance could be registered.⁴² However, the situation would have turned out to be of considerable complexity if there had been an objection raised against the French reservation.

The idea behind the temporal restrictions in the Vienna Convention on the presentation of reservations was to eliminate or at least minimize the inconvenience that the confronted states experience when suddenly faced with a reservation. They have to evaluate its effects on the operation of treaty norms in order to decide what kind of reaction has to be chosen with regard to the reservation, accepting it or objecting to it. The other parties to the treaty may be embarrassed and irritated by reservations that may be presented at any time during the operation of the treaty.⁴³ Reservations always introduce an element of uncertainty into treaty relations and if the presentation of reservations is not limited to certain specific occasions, this uncertainty becomes even more accentuated. It was therefore considered justified to require that states introduce their reservations at the moment they have made up their mind about giving their definitive consent to the treaty. The acts of signing, ratifying and acceding have been preceded by investigations as to the implications participation in a treaty will bring about. There is a presumption that a ratifying or acceding state is fully aware of the consequences of participating in a treaty.

Nevertheless, it has to be admitted that the temporal conditions for formulating reservations are not absolute. Reservations formulated at moments other than those indicated by the Vienna Convention definition of reservations may turn out to be valid and effective. The temporal conditions are therefore not to be counted as defining characteristics but simply as accompanying characteristics of reservations.⁴⁴ When facing a unilateral statement presented at some moment other than those specified in the Vienna Convention it would not be warranted to hold such a statement as not qualifying for a reservation. As we have seen a treaty may itself authorize reservations to be presented at some other moment. All parties may further agree to tolerate an exception from the temporal restrictions.⁴⁵ Where these circumstances are not present a statement notified at some time other than when communicating one's final consent to the treaty will not be governed by the rules on acceptance of and

objection to reservations and may well be ignored by the other contracting states.

Reservations have been characterized as unilateral statements. The quality of being unilateral figured in various draft definitions on reservations of the ILC and was retained by the Vienna Convention.⁴⁶ The qualification as unilateral does not signify that reservations are unilateral acts producing legal effect directly through their presentation by a state. As a rule they do not have such force.⁴⁷ What is actually meant by this characterization is that a reservation is individually introduced by a state with the intention of safeguarding its specific interests in relation to the body of norms expressed by the treaty text. Reservations qualify the attachment of a state to the treaty norms independently of other participating states. Of course, we frequently encounter reservations by different states that are almost identically formulated. They have either been the outcome of common consultations or have simply been taken over by one state from another.⁴⁸ Such identical reservations nevertheless constitute separate acts and are notified separately and may be independently reacted upon. Each reservation has its own life, as a confronted state may choose to object to one state's reservations but remain silent and thus accept another state's identical reservation. Reservation practice shows that this has often been the case. Confronted states cannot be assumed to act in a consistent way when objecting to reservations.⁴⁹ Whereas the United Kingdom, for example, objected to all the 14 reservations formulated to article VIII section 30 of the 1946 Convention on the Privileges and Immunities of the United Nations on the compulsory settlement of disputes, Lebanon made just one objection to the reservation presented by the Soviet Union.⁵⁰ During the drafting work within the ILC there was some criticism uttered against the use of the term 'unilateral' as there could well be occasions when a group of states would formulate a common reservation notified in a single instrument. Strangely, this view expressed by Paredes in the ILC was not further commented upon during the subsequent deliberations.⁵¹ In spite of the possible presentation of a single instrument containing a reservation by a number of states, we still are faced with as many reservations as there are states behind the notification. Confronted states may choose to act separately with regard to each single reserving state.

Reservations are formal statements. Although their formulation in writing is not embraced by the terms of the definition, it would according to article 23(1) of the Vienna Convention seem to be an absolute requirement. It is less common nowadays that the various acts of consenting to a treaty occur simultaneously, therefore it is not possible for an orally presented reservation to come to the knowledge of all contracting parties. In the era of differentiated treaty-making procedures it becomes essential for reservations to be put down in writing in order to be registered and notified by the depositary, so that all interested states would become aware of them. A reservation not notified cannot be acted upon. Other states would not be able to expressly accept or object to such reservations. There is therefore no basis for assuming tacit acceptance.

The second part of the definition containing the *differentia specifica* relates to the connotation of the term 'reservation'. The defining characteristic or

criterion of a reservation is that it has a certain impact on the operation of the norms as formulated in the treaty provisions. To qualify as a reservation a statement must either 'exclude' or 'modify' the legal effect of certain provisions, i.e., alter in a certain way the norm system manifested by the treaty text. These criteria will help to distinguish reservations from other unilateral statements which are presented at the same moment as reservations.

The question of the 'excluding' and 'modifying' effects of reservations on the treaty norms seems, at first glance, to be unequivocal, but it happens to be one of the very crucial problems in connection with reservations. Treaty practice quite often demonstrates that states have real difficulties in deciding if a statement does or does not alter the norms set up by a treaty.

The *differentia specifica* of the Vienna Convention definition intended to clarify the 'essence' or the very criteria of reservations, in fact give birth to new problems that had not been conceived of originally. How do reservations relate to the treaty text, and how do they affect the treaty norms? How do reservations actually change the relations between the reserving state and the confronted states? These questions bring into focus the meaning of expressions used in the definition of 'reservation', such as the "... legal effect of certain provisions", "... in their application to the [i.e., the reserving] state ...", "excludes" and "modifies". All these expressions which according to the requirements for the terms used in the definiens are supposed to be simple and clear, are in fact imprecise.

6.3 THE OBJECT OF RESERVATIONS: THE LEGAL NORMS AS DISCLOSED BY THE TREATY PROVISIONS

Reservations are assumed to intervene in the operation of legal norms, and not with the wording as such of the treaty provisions which as norm formulations are intended to transmit information about norms. As Statements may bear upon the wording of certain provisions without modifying at all the norms that lie 'behind' the formulations.⁵²

One of Imbert's criticisms of the Vienna Convention definition is that according to it a reservation appears to "éliminer une disposition" whereas it actually will "éliminer une obligation".⁵³ This criticism is not quite justified. A reservation does according to the definition unequivocally not 'exclude' or 'modify' a provision in the sense of being a norm formulation, but "the *legal effect* of certain provisions". Reservations are according to the wording of the Vienna Convention clearly not concerned with the formulation of norms, or the provisions as linguistic creations, but with the underlying norms.⁵⁴ The legal effect of treaty provisions is to introduce norms creating obligations and rights. Although the delegates to the Vienna Conference on the Law of Treaties did not venture into the distinction between norms as such and their formulation by means of language, this question has, however, been incidentally touched upon. Hungary wanted to amend the definition of reservation in the following way:

“ ‘Reservation’ means a unilateral statement however phrased or named, made by a State when signing, ratifying or acceding to a treaty, whereby it purports to exclude, to vary or *to interpret* the legal effect of certain provisions of the treaty in their application to that State.”⁵⁵ (emphasis added)

This amendment was rejected as the norms themselves could not become the object of interpretation but only the linguistic construction that was intended to express these norms.⁵⁶ Interpretation is an intellectual activity that is directed towards the legal text and its individual provisions in order to determine their legal effects, and to identify the rights and obligations that are supposed to be transmitted by the provisions. It is beyond doubt that a reservation affects a norm in a special way.

CHAPTER 7

CONCEPTS OF NORMS

Legal norms constitute a specific category of social norms. Social norms may in principle regulate any aspect of human activity, both of a primarily psychological kind (mental) relating to the perception of phenomena in nature, rational argumentation, aesthetic evaluation and linguistic usage, and of a primarily physiological (material) kind relating to physical conduct. Social norms are generally understood to regulate the conduct of individuals, groups, and such complex collectivities as states, however, this limitation is too restrictive. Legal norms as social norms affect the various forms of human activity in a very specific way. Legal theories intending to analyze legal norms have either stressed the peculiarities of legal norms and have therefore advocated an independent approach with distinct methods of inquiry, or they have focused their attention on all the similarities between legal norms and other categories of social norms, considering it accordingly legitimate to look for impulses in the social sciences when inquiring into the nature and the operation of legal norms.¹ Especially in the case of international legal norms which regulate the conduct of states it seems more natural to look for ideas in sociology and political science. International law has not achieved the same degree of formalization and institutionalization as domestic law. This formalization and institutionalization has been as a rule considered the main distinguishing characteristic of legal rules, justifying the search for a distinct analysis. Norms of international custom for example may be quite difficult to distinguish from other interstate norms of a non-legal character such as comity and usage.

Sociology is the scientific discipline where the analysis of the concept of norm ought to be of prime concern. However, it is conspicuous that no generally accepted notion of norm has emerged. This is explained by the fact that sociology is deeply divided into different approaches which have basically divergent views on the nature of man and of human society.² What has been labelled as functionalism and conflictualism have become established as the two mainstreams of sociological inquiry. Functionalists, and more pronouncedly so the representatives of early functionalism, are leaning on assumptions based on analogies with biology and see in all phenomena of certain persistence the means of the social organism called society (or state) to maintain its cohesion and guarantee its survival. Thus, the existence of social norms is due to their ability to satisfy certain common needs of society. As people become aware of these needs and believe that certain states of affairs will satisfy them, the achieving of these states of affairs becomes desirable. They acquire a social value and thus may turn into a common goal for which it is believed worthwhile to strive.³ These aims and goals become interests when they provide motives for action by individuals, groups, classes and states.⁴ Interests push towards a conduct that is believed to satisfy perceived needs.

The most extreme forms of early functionalism are represented in the

writings of Talcott Parsons and his followers.⁵ Generally speaking, this school contends that every single fact contributes to the maintenance of the social system. As this contention proved not to be able to give satisfactory explanations to various phenomena, it was rebutted, not least, by Merton's assertions of the presence of dysfunctional elements in every society.⁶ This modified functionalism also holds that society is largely an appropriately functioning collectivity, where the dysfunctional elements are outnumbered and neutralized by the functional elements. Functionalistic ideas and notions have also been received in jurisprudence. Roscoe Pound's view on law as social engineering is based on the works of Talcott Parsons and relies largely on the assumption of law as being a cohesive force. Law is the mechanism that reconciles conflicting interests of individuals in order to meet the demands of overriding social interests. The reconciliation of conflicting interests is possible not only due to the existence of a formal procedure for the adjustment of conflicting interests, but also because of the presence of a body of superior values shared by the whole society. This body of fundamental values helps to determine how conflicting interests are to take precedence over each other. The major problem for Pound was to assert those basic values, which for him, not surprisingly, happened to be quite uniform with the postulates of social liberalism.⁷ Certain writers on international law such as McDougal and Lasswell have introduced Pound's ideas into the study of international law.⁸ The functionalistic approach in international law has assumed that the international community of states slowly but steadily develops towards closer integration and increasing institutionalization.

There has been an apprehension of functionalism representing a conservative outlook as it seems to concentrate on the static aspects of society.⁹ This is the case in spite of the fact that functionalism uses such concepts as change and evolution. However, change is seen more as a continuous, slow and stable adjustment of society to the challenges of external threats and dangers.¹⁰ Changes within a society are understood to be the mode by which society maintains its homeostasis or inner balance. Functionalists, especially those representing the more extreme organic form, have to face the immanent danger of circular reasoning. Society exists and survives due to the operation of certain social phenomena. Social phenomena in their turn exist and persist because they help to maintain society. Every social phenomenon that is observed is therefore assumed to fulfil the function of maintaining the social system, and as far as the survival of the society is seen as an obvious aim, the persistence of every social fact is justified by its existence.

The conflictualist approach in its original and extreme form asserts that societies are characterized by constant clashes between the antagonistic interests of those classes that have been formed as a result of the prevailing modes of production. Conflictualists also reason in the same manner as functionalists, speaking of needs that, when recognized, turn into values and achieve the character of interests, thus inducing an action to satisfy needs.¹¹ However, conflictualists will not accept that needs are common to all individuals, groups or classes in a society. Social institutions, such as the legal system, being only one form of the superstructure, cannot, with regard to societies in a presocialistic state, be held to meet the shared interests of the members of a society. The

ruling class having control over the means of production has all the power to form the social institutions to accommodate its specific interests. By forming the political, legal and cultural system, and elaborating an ideology that legitimizes these institutions of the superstructure, the ruling class maintains its control over the dispossessed.¹² As legal norms were considered one of the most important means of keeping the dispossessed in submission, legal norms and systems were condemned as a bourgeois institution that would have no place in a communist society. This contemptuous attitude towards legal norms had the effect of giving the study of social norms and legal norms a low priority. The study of legal norms was for a while given the character of only a critical inquiry into the legal systems of bourgeois societies.¹³ However, the study of legal norms gained new actuality with the emergence of socialist states, which were not able to get along without some form of legal order and the insight that even norms of bourgeois states could be strategically used to strengthen the position of workers and other dispossessed groups.¹⁴ Conflictualism had experienced certain changes similar to functionalism. The modifications have occurred in the direction of not denying categorically the possibility that there could be legal norms based on values having a wider following than only among the owners of the means of production.¹⁵ Conflictualist views have since the social unrest of the late 1960ies and early 1970ies spread to states where functionalist views had traditionally dominated. Thus in Western capitalistic states conflictualist thinking is no longer an unfamiliar apparition.

Though functionalist and conflictualist approaches occasionally seem to come close to each other it is still important to be aware of the basic differences in their general perspective on social phenomena.

The difference is crucial when it comes to the study of social and legal norms. Depending on which approach we choose we will arrive at different results when trying to solve problems concerning social and legal norms in connection with their identification, interpretation and systematization. Functionalists will find it less suspicious to resort to various modes of juristic argumentation and to assume the preponderance of common values and principles which will justify legal decisions. Conflictualists expect to find behind every norm, both social and legal, the propagation of the egoistic interests of a certain class. There is no difference whether the legal norms are of a substantive nature or are simply procedural and formal. Legal rules do have the appearance of safeguarding the equality of disputing parties, but applied to concrete cases in a capitalistic society their outwardly non-discriminatory nature turns out to be deceptive, working factually in favour of the ruling interests. If a legal norm contrary to the general presumption is based on more widely shared values, this has to be expressly proved.

In international relations, conflicts brood just beneath the surface of the formal relations between states. At the level of global relations we simply cannot ignore the fact that the world community is divided into three main groups of states with largely irreconcilable ideologies, the traditional Western states, the socialist states and the states of the Third World trying to find a third way.¹⁶ International relations of the post World War II era are characterized by a resentment towards traditional international law. The socialist states and

the newly independent countries consider it to be too permeated with ideas and values superimposed from traditional Western legal thought. The Western states have believed it feasible to transplant principles from the national legal systems into the international legal system, a position criticized by the socialist and the newly independent states.¹⁷

The harsh reality of today's interstate relations has to be kept in mind when undertaking a study of international legal norms. These norms often have a short and stressed life on the battlefield of pugnacious doctrines. Choosing a conflictualist approach is even more justified due to the fact that the socialist states and a good part of the Third World countries officially avow a conflictualist ideology. This is naturally one of the reasons why international law has undergone a profound reassessment due to the fact that the ideas and values on which it was built have been discerned and challenged.

It must be admitted that there are some faint efforts to map out those values that may be asserted as being common to all states in the international community. Nowadays, states are not only preoccupied with the elaboration of concrete norms of conduct but also to some extent with the establishment of those values that are to be the goals of all states and which will help and guide in the further development of the international norm system. It has become a familiar phenomenon that universal and regional organizations adopt declarations that clarify the aims that ought to be common for all member states and which would facilitate the further elaboration of more concrete rules of conduct. The practice of the UN abounds with examples where the elaboration of conventions has been preceded by policy-indicating types of declarations. The best known example may be that of the 1948 Universal Declaration of Human Rights (resolution 217 A(III)) which was followed by the two Covenants on Civil and Political Rights, and Economic, Social and Cultural Rights (resolution 2200 (XXI), Annex).¹⁸ The practice of materializing values in such declarations on principles is partly occasioned by the fact that international relations are tainted by the struggle of competitive ideologies. In order to make a minimum of co-operation possible states must make an effort to map out those values that they are sure of as being recognized by all states.

In spite of the modest efforts to strengthen a common value system the case for the functionalistic assumption of a cohesive norm system based on the body of generally shared values is weak. This signifies that when intending to study the legal norms we have to be aware of the fact that the possibility of assuming the existence of shared values are restricted and that we will therefore encounter difficulties in arranging international legal norms into complete and consistent systems. If international law is admitted to have largely the nature of compromise, contradictions between individual norms are inevitable. The settlement of conflicts between individual norms and the filling of gaps are rational operations that require the ascertainment of a minimum consensus on the values that are to be the goal of the action of states.¹⁹

This preconception of the background of interstate relations will affect our efforts to construe a system on the basis of a set of individual norms of international law. Not least is the phenomenon of reservations to some extent reflecting the absence of a consensus on values, which is hindering the emergence of universally binding norms.²⁰ As reservations affect the creation and opera-

tion of individual legal norms the task cannot be avoided of venturing into the phenomenon called a norm, looking at various concepts of norms that have been proposed, choosing one that may help us to bring some light upon the operation of reservations.

7.1 SOCIOLOGICAL CONCEPTS OF NORMS

Legal norms form a category of social norms because they regulate the conduct of individuals and groups. Attempts to clarify the concept of norm are more common among sociologists of the functionalist school. Conflictualists have as a rule considered the study of social norms to be of peripheral interest if not condemning it altogether to oblivion. However, the analysis of social norms does not have to be the privilege of the functionalists, nor are the methods developed by them unconceivable as a basis for a possible conflictualist analysis of social norms.²¹

There have been manifold ways of elucidating the concept of social norm. Rommetveit distinguishes between three principal ways of conceiving the phenomenon of social norms as advanced in sociology.²² As the first concept he mentions the one which identifies norms with "shared frame of reference" and was used in the works of Newcomb and Sherif.²³ This concept, which Rommetveit rejects because it is plagued by outspoken ambiguity, sees a norm to be a standard for common perception and evaluation of observable phenomena. It is used in a variety of ways meaning:

- (a) an accord on the object perceived
- (b) agreement on the object perceived and the specific aspect inherent in the object ("dimension")
- (c) agreement on the object perceived, its "dimension" and the mode for evaluating this "dimension"
- (d) comprising agreement as to all these three points and also as to the outcome of the evaluation.²⁴

The second concept is to simply identify a norm with uniform behaviour. This concept is according to Rommetveit the least satisfactory, even if it for methodological reasons would seem to be the most welcome. However, observed uniform behaviour will be of limited value as it will not constitute any reliable ground for proving the causes of uniform behaviour. The concept will hardly be helpful in predicting future conduct; at best it may help make sketchy comparative descriptions of two or more societies.²⁵

Rommetveit settles for the third concept considering it to be the most fruitful one. Norms are simply identified with social pressure and as such they constitute a relational concept. As a social phenomenon pressure is exerted by one person, the norm-sender, towards another person, the norm-receiver. This pressure may influence the various forms of human activity; perception, evaluation, and action. In order to arrive at an operational non-circular definition Rommetveit introduces as secondary notions the forms through which social pressure does manifest itself. Pressure is exerted through wishes, expect-

tations, signs of satisfaction or dissatisfaction and sanctions. Pressure is experienced through the perception of wishes and expectations as well as through the anticipation of satisfaction or dissatisfaction and sanctions. The forms through which pressure manifests itself are operational as they are assumed to be observable and measurable entities.²⁶ A slightly different view is held by Galtung and Luhmann, who consider expectations to be the primary notion for explaining the concept of norm. Expectations as such are already identifiable and observable.²⁷

The merits of Rommetveit's presentation lies in its recognition of the many-sidedness of the concept of social norm, accepting the relevance of the cognitive, communicative and prescriptive aspects. Special regard is paid to the communicative aspect, as he conceives norms to be mainly an interactionist problem. Expectations acquire their character of social norms by the fact that they are communicated between individuals and groups. In sociological jargon norms are sent and received, which would entail that the communication would not be a defining criterion but only an accompanying characteristic. The concept of norm used by, among others, Rommetveit would not comprise the criterion of having been communicated, but only of being communicable, able to be sent and received. Norms may well be sent without ever being received or received without ever having been sent.²⁸

Norms are not simply cognitive, because they cannot be identified with the belief that certain acts will be committed or certain events will occur in the future. These so-called cognitive expectations are pure predictions. However, as it is widely held by sociologists that social norms are something more than regularity of behaviour, expectations will cohere with an attitude, the prevailing feelings of desirability or undesirability. Social norms differ from cognitive expectations. To paraphrase Luhmann: Frustration of cognitive expectations leads to the modification of these expectations to harmonize with the new observations. Social norms are at hand when thwarted expectations do not result in any modification of these expectations, but to measures which will avoid disappointments of future expectations. In such cases expectations acquire a prescriptive character (normative expectations) and contrast with cognitive expectations.²⁹

Although the conception of social norms as a type of expectation has been adhered to widely by sociologists it still remains doubtful if it will be an adequate starting point for clarifying the concept of legal norm as a category of social norms. Most of our expectations are not based on immediate experiences, but are the result of transmitted knowledge or 'generalized experience'. This holds true with regard to all kinds of expectations, both cognitive and normative. People expect the temperature of boiling water to be 100 degrees centigrades, though most have not undertaken the experiment of measuring the temperature of water brought to boil. Cognitive expectations are mostly the result of conventional wisdom according to Galbraith.³⁰ Only on the peripheries of accumulated and accepted knowledge will expectations be based on immediate observations.³¹ Similarly, normative expectations are in only a very few cases derived from repeated observations of how persons or groups behave. Normative expectations are often said to arise out of our knowledge about the 'position' a certain person holds.³² We have this knowledge because of our acquaintance with the nature and contents of legal

instruments such as statutes, instructions, regulations, etc. Festinger in introducing his concept of norm, distinguishes between "overt pressure" and "more subtle pressure".³³ Laws constitute a certain kind of overt social pressure. Social norms are thus defined in terms of social pressure, which in its turn is clarified by referring among others to laws.

Trying to elucidate the concept of legal norms on the basis of social norms easily ends up in circularity. Legal norms are explained with the help of social norms, which are explained in terms of expectations, which in their turn are explained in terms of positions, which can be determined by our knowledge about laws, etc. The same circularity will be at hand when we define norms in terms of pressure as proposed by Festinger.

The notion of expectation instead of being considered synonymical with social norms, may be useful in explaining the genesis of norms.³⁴ Predictions based on empirical observations may, when combined with a certain attitude, achieve a prescriptive touch and turn into a social norm. Expectations that were originally purely cognitive may after a period become prescriptive (normative), according to Luhmann because of the need and desire to minimize the complexity and convergence of social life.³⁵

7.2 CLASSIFICATION OF SOCIAL NORMS AND DISTINGUISHING CRITERIA OF LEGAL NORMS

There has been a certain amount of effort to classify the various kinds of social norms which would help to distill those qualities that, for example, distinguish legal norms from other norms. One of the earliest attempts to classify norms is the description by Kingsley Davis of the different social norms that had been dealt with by sociological research.³⁶ Davis's description inspired other sociologists to elaborate more systematical presentations of the various categories of social norms. Lazarsfeld ordered the social norms as described by Davis according to three aspects. The distinction between various norms were to be made on the basis of: (a) the manner of creation, (b) the mode of enforcement and (c) the importance attached to the norms by the members of a group. Under the first aspect the distinction is to be made between norms that come into life through a slow, unplanned procedure, or through deliberate creation at an identifiable date and place. Turning to the second aspect, distinction is made between norms which are enforced through a settled procedure, or through individual appreciation of the members in a group. Finally, there may be a distinction between norms where a derogation is met with strong disapproval and norms where a derogation does not lead to any noticeable negative reaction. On the basis of these properties Davis's norms may be arranged into the following property spaces.³⁷

How originated	How enforced			
	informally		formally	
	group feeling		group feeling	
	weak	strong	weak	strong
tradition	folkways	mores	customary law	
legislation	—	—	enacted law	

Lazarsfeld's scheme would suggest further categories, beside those described by Davis, but he abstained from any such attempt. Gibbs provided a typology of norms that is based on a wider range of distinguishing characteristics. Distinction is made on the basis of three major variables: Collective expectations, collective evaluations and probability of reactions (sanctions in a broad meaning). Sanctions are further subdivided as to the specific ways they may be applied, by anyone or by a specially indicated group of persons with a particular status, with or without coercion.³⁸

We find that the notions of evaluation and expectation tend to reappear in different guises. However, neither the requirement for norms to be based on common evaluations nor their effect of satisfying expectations achieve separately the character of a defining criterion. Even in cases where we encounter uniform behaviour with greater probability, we may not infer from this the presence of a binding norm. It must also be proved that the uniform behaviour is purposive, conforming to certain standards set up as goals. The evaluative quality of norms underlines the function of norms as means to realize certain common aims. Norms are operationalized values.

Both functionalists and conflictualists will assume as stated above the value basis of norms, but they differ on the extent that these values are shared by members of a society. Functionalists will see no problems in presupposing a generally shared value system. Conflictualists will stress the prevalence of divergent value systems, where values shared by the ruling class are those on which the legal and other social norms are based.³⁹

The expectative and evaluative aspects play complementary roles. Trying to explain social norms with only the help of one of these aspects will not provide a correct picture of norms and how they function. Not all expectations, no matter how regularly they are satisfied, signify that a norm is in operation. Expectations may be simple predictions as to coming acts or events, short of any prescriptiveness. We accept also that norms still may exist, even if it is probable that the prescribed act will not take place. On the other hand, it may be the case that we find a set of shared values to be present, but we are still not justified in stating that there exist some social norms that will guarantee these values. Furthermore, norms are considered to exist even if they do not guarantee values shared by those that are supposed to follow the norms. The concurrence of the expectative and the evaluative aspect is crucial for understanding the character of social norms. The more our expectations or predictions about future conduct turn out to be true, the more effective the norms are said to be. The more our norms are said to be based on a widely shared body of values, the more the norms are said to be integrated within the group. The expectative and evaluative aspects may be combined into what may be called the *generic dimension*. The generic dimension is answering the question whether norms reflect actual behaviour and common values. The generic dimension will produce the following property spaces:

		INTEGRATION (shared values, collective evaluation)	
		high	low
EFFECTIVENESS (predictability, collective expectations)	high	1. integrated, effective norms	2. imposed, effective norms
	low	3. integrated, ineffective norms	4. imposed, ineffective norms

The four categories of norms appear to form two pairs of conceptional opposites. We are here seemingly dealing with contradictory concepts. A norm is either integrated or imposed, but it wouldn't be both at the same time. The four categories are however to be looked upon as ideal types. In fact, norms may be placed on a floating scale shading over from one ideal type to another. We usually expect to meet norms belonging to type 1 in simple societies, where the distinctions between different norms is not marked and where the operating norms are closely connected with prevailing values.⁴⁰ Norms of type 2 we would be likely to meet in more complex, differentiated societies, where norms may have acquired a greater independence with regard to values held by the individual members. Norms of type 3 and 4 we expect to encounter in societies under exceptional situations of social disorder. In the case of category 3 the disorder may be due to external factors. It may be caused by the forces of nature, disasters making it impossible to follow certain norms. It may be caused by the intervention of man as in the case of occupation of a state by a foreign power. Or the social disorder may be caused by internal factors, such as the widespread disobedience of the population challenging the legislation introduced by the ruling class.

Norms, of course, have a dynamic life and their character changes through time. A norm originally imposed, may become internalized by certain individuals and then slowly become acquiesced in and accepted by the population at large. Norms formerly strongly approved of by the people will no longer be so when moral convictions have changed. Officials may still apply such legal norms against the dominant view of the population.⁴¹

To qualify for a norm it is assumed that neither of these two aspects can be completely removed. Where norms have no possibility whatsoever to become effective in the meaning of being followed by the citizens or implemented by the officials, people will stop believing in the necessity and the appropriateness of following those norms. Similarly, the complete absence of values that are to a certain extent shared, will eliminate the preconditions for maintaining any norms in operation. There must be at least a nucleus of persons sharing some values and energetically propagating norms for their realization. Even a despotic ruler will not be able to govern without a certain number of loyal officials and subjects.⁴²

Davis and Lazarsfeld consider the modes of creation and enforcement as important aspects for distinguishing between various types of norms, not least

legal from non-legal. Gibbs rejects the creative aspect, as he does not consider it to be a defining characteristic.⁴³ For him the sanction aspect is of central importance and constituting the very criterion of legal norms. However, this view has been condemned by others.⁴⁴ As the character of the mode of creation and sanction is not going to be prejudiced, both aspects will be combined into the *formal dimension*. Norms may either be formally or informally enacted or formally or informally enforced.

		MODES OF CREATION	
		formal (enactment)	informal (tradition)
ENFORCEMENT	formal	1. enacted, formally enforced norms	2. traditive, formally enforced norms
	informal	3. enacted, informally enforced norms	4. traditive, informally enforced norms

The formal dimension has been widely used for distinguishing legal from non-legal norms, though it may well be doubted whether the distinction is a conclusive one. We would be eager to refer statutes to the first type of norms and domestic customary law to the second. International treaty-based norms would be referred to category 3 and international custom to category 4. This classification is not a happy one. International law provides for formal enforcement procedures, though they as a rule are only facultative and not compulsory. On the other hand, domestic norm systems may also provide for facultative disputes settlement procedures. The formal dimension does not pay regard to the fact that formal enforcement procedures may either be compulsory or facultative, the former being the rule in domestic legal systems, the latter being the rule in international law. However, both systems are familiar with formal enforcement procedures.

To the generic and formal dimension may be added the *operational dimension*. This dimension does draw the attention to the relations between norms and their scope of operation. Two or more norms may regulate the same subject-matter in a way that may lead to contradictory results. The conflict must be solved in some way, usually by invoking a third norm which indicates which of the conflicting norms may prevail over the other. Norms may therefore be ranged into relations of superiority and subordination. Norms may be general and affect all the members residing within the whole territory where the norms operate. Or they may be particular and concern only a certain category of specified individuals or apply to only a part of the territory where the legal order as such is effective.

		GENERALITY	
		general	particular
SUPERIORITY	superior	1. general, superior norms	2. particular, superior norms
	inferior	3. general, inferior norms	4. particular, inferior norms

Nor does this dimension turn out to be fruitful in distinguishing legal norms from other social norms. Legal norms may be of any of the four kinds individualized through the operational dimension. Legal norms may well be over-ridden by other legal norms. They may be particular, concerning a limited number of persons or states. A norm may also be legal in the case where it regulates a single event not supposed to recur later. The operational dimension may well be applied to study both legal and non-legal norms. The latter may as well as the legal norms be ranged in different classes of generality and superiority.

The three dimensions may be combined providing for a more sophisticated classification. Here it will suffice to combine the generic with the formal dimension giving the following 16 categories:

		INTEGRATION			
		high CREATION		low CREATION	
		formal	informal	formal	informal
EFFECTIVENESS	high	ENFORCEMENT formal	1. integrated, effective, enacted, formally enforced norms	2. integrated, effective, traditive, formally enforced norms	3. imposed, effective, enacted, formally enforced norms
			4. imposed, effective, traditive, formally enforced norms	5. integrated, effective, enacted, informally enforced norms	6. imposed, effective, traditive, informally enforced norms
	low	ENFORCEMENT informal	7. integrated, ineffective, enacted, formally enforced norms	8. integrated, ineffective, traditive, formally enforced norms	9. imposed, ineffective, enacted, formally enforced norms
			10. integrated, ineffective, traditive, informally enforced norms	11. imposed, ineffective, traditive, informally enforced norms	12. imposed, ineffective, traditive, informally enforced norms

Norms belonging to category 1 seem to be an ideal kind of legal norm as they contain all the properties that would corroborate our view that we are dealing with legal norms. There are justified reasons for doubting if such legal norms would be possible in reality. If norms are completely integrated because they are internalized by all members of the society and they are completely effective because everyone follows them, are there then any possibilities for a formal enforcement machinery and a formal enactment procedure to develop? The change for the actual occurrence of disobedience and rejection of common values are often the very reasons for the emergence of formal machineries for norm enactment and norm enforcement. Norms that we find in category 16 would comprise all the refutative characteristics, the properties that speak against the assumption of the existence of legal norms. Still there could be imagined legal norms that may fall under this category. Such legal norms may be present where a feudal lord tries to maintain customary law in spite of an increasing disobedience among the population and a weakening loyalty among the law-enforcing officials. Such norms could still be contended to be legal. In the case where these norms have no chance whatsoever to be enforced, the old legal system has collapsed, paving the way for the possible emergence of new legal norms.

No attempt at classification of norms has managed to sort out any characteristics that could be considered to be defining ones. What has been achieved by means of classification is simply an enumeration of accompanying characteristics. Whenever we detect any characteristic of the corroborative kind, the property of being based on shared values, of being effective, of being formally enacted, of being formally enforced, of being general, or of being overriding, we have one more reason to assume the presence of a legal norm. If we notice the presence of some refutative characteristics, this may be compensated for by the presence of other corroborative qualities.⁴⁵ Former optimism and belief in the possibility of elaborating a comprehensive definition of legal norms has vanished. It is now generally recognized that it will not be possible to state the necessary and sufficient criteria that have to be present in order to determine the legal character of a norm.

7.3 LEGAL NORMS AND THE RECIPROCATION OF NORMS OF CONDUCT AND NORMS OF COMPETENCE

Owing to the difficulties in arriving at a satisfactory definition of a legal norm, an alternative way has been found when looking at legal norms as norms that operate in a peculiarly interconnected way. Legal norms have a specific kind of bindingness or validity which distinguishes them from other social norms such as habits, folkways, mores, fads and fashion.⁴⁶ What does it actually mean that legal norms are binding or valid? According to Harris the term 'validity' has been used in at least five different ways.⁴⁷ In the present context only two of these understandings will be of interest.⁴⁸ Legal norms may be characterized both by their *internal validity* and their *external validity*.⁴⁹

Internal validity may in its turn be conceived of as having two meanings. The first establishes the validity of a norm on the basis of the fact that it has been

created and operated in accordance with other norms. The second, which will be looked at more closely at a later stage, establishes the validity due to the presence of a conviction as to its prescriptiveness. In the first case we have a set of primary norms which are going to be called *norms of conduct* and which are dependent on a secondary group of norms, the *norms of competence*.⁵⁰ The presence of both primary and secondary norms is a prerequisite to construe the body of legal norms as a system. The validity of the primary norms may also be called systemic, because the conditions for determining the validity of the primary norms of conduct are indicated by other norms belonging to the legal system itself. Internal validity in the first meaning may also be termed *formal validity* or *legality*. A norm of competence from which a norm of conduct derives its formal validity may in its turn be governed by a third norm. This procedure of establishing the validity of legal norms may be traced back over many steps.⁵¹ However, at a certain point we have to stop short as we will not be able to proceed further, because we cannot identify any other norm from which our ultimate norm could be derived. In domestic law we will find this last or ultimate norm embraced in the constitution of the state.

The *external validity* of a legal norm signifies that it is actually followed and obeyed.⁵² The legal norm is effective as it has an undisputed impact in guiding the conduct of individuals and groups. It has not been possible to constitute the effectiveness as an absolute condition. In any society we will have to live with a certain non-compliance with, and violation of, legal rules. In certain spheres of legal regulation this may be more marked than in others. With respect to tax laws and traffic regulations non-compliance is believed to be extensive. In order to maintain the requirement of effectiveness it has been held to refer to the system of legal norms as a whole.⁵³ The legal order is by and large operating satisfactorily. No indication has though been given as to how large a deviance a society may tolerate before we have to admit that the legal order has collapsed.⁵⁴

The ultimate norm of competence, which is the basis for legalizing all the other norms, is itself assumed to be valid.⁵⁵ The internal validity of this ultimate norm must be conceived differently, because we are unable to prove the presence of formal validity that characterizes all the other legal norms. The efforts to introduce a hypothetical *Grundnorm* in the spirit of Kelsen have encountered profound criticism, due to the impossibility of indicating in a satisfactory way the contents of the *Grundnorm*. This *Grundnorm* would have established the formal validity of the ultimate norm of competence, but it would in itself not have this quality. Although it was not essential, in accordance with the general formalistic approach of Kelsen, to assert the contents of the *Grundnorm*, he nevertheless felt the need to indicate the possible contents of the *Grundnorm* and the choice was certainly not random. Beside the problems of determining the contents of the *Grundnorm* it was felt alarming to be forced to have to derive the formal validity of legal norms from a mere fiction.⁵⁶

The problem of the validity of the ultimate norm leads us by necessity back to the discussion on the classification of norms in order to recollect certain ideas expressed there. The generic dimension shows that norms are a complex concept combining both external or empirical and internal or psychological

aspects.⁵⁷ The external aspect underlines the significance of a regular and uniform conduct. The internal aspect presupposes a certain attitude, the conviction that the conduct is required. We say that a norm is 'internalized' to use an expression originating from the theory of learning.⁵⁸

With regard to legal norms, the requirement of the presence of both the external and internal validity has been relaxed.⁵⁹ Just as it cannot be required that legal norms are never deviated from, it can neither be required that legal norms are always obeyed out of an inner conviction; many are the legal norms that cannot be considered to have been internalized by individuals. Legal norms are often complied with out of routine without further reflection. Or legal norms may be complied with in spite of an inner resentment against them. Legal norms are equally binding on persons perfectly unaware of them and consequently unable to have internalized them.⁶⁰ Ignorance is not accepted as a justification for non-compliance with legal norms. Legal norms have the peculiarity that the absence of internalization may be compensated for by their formal validity.

However, in the case of the ultimate norm, the notion of internalization, the internal validity regains its original relevance. Where the ultimate norm cannot be construed to be formally valid we must prove it to be psychologically valid. Considerations of *legitimacy* will take the place of former considerations of legality.

Members of a stable society are assumed to have internalized the fundamental principles according to which their society is governed, i.e., the ultimate norms. In accordance with Hare we may speak of the "allegiance" of the people to a certain form of government.⁶¹ In times of peace and stability this allegiance to the ultimate norms is inferred from the behaviour of the people, their choice to live in a certain society, their participation in the elections, general obedience to its laws, etc. During periods of social unrest (such as rebellions, revolts, uprisings and civil wars) the question of allegiance by the people to the fundamental principles of government, the ultimate norms, comes under reconsideration. The members of a society are faced with the task of re-asserting their former allegiance or to declare their open opposition to the traditional system of government. The successful usurpation of the political power by a revolutionary movement does not suffice to bring about a new social and legal order. The new rulers will have to legitimize their power, pure force has to be turned into *authority*. Authority will only be present where the population has shown its allegiance to the new rulers. It is for this reason that the consistent advocating of an ideology by means of propaganda has a central role to play. Also in the realm of interstate relations there may be times when the ultimate norms of the international legal system are put to the test. Where the composition of the international community has undergone a radical change a revaluation of the ultimate norms of international law may turn out to be inevitable.

Hart contends that the psychological, internal aspect is present, as concerns the secondary *norms of recognition*, when the officials in charge of the implementation of the primary norms of conduct have approved of the secondary norms.⁶² It would seem that Hart overemphasizes the role of officials by limiting the role of the ordinary citizens to ovine and unreflecting compliance

with the mass of legal norms of conduct.⁶³ Hart's model of a legal system does not take account of the frequent occasions where a legal system emerges due to a successful revolution. This occurs in spite of the fact that the officials have for their part continued to accept traditional secondary rules of recognition. The need to assert the "allegiance" of the population, as mentioned by Hare, to the ultimate norms cannot be removed. It has to be admitted that primarily it will be the allegiance of the population and not the approval of the norm-applying officials that is required to determine the internal validity of the ultimate norms. The act of allegiance may be of various degrees. There may be a positive, express approval of the ultimate norm, marking a clearly positive attitude to the implementation of the norm. The allegiance is less accentuated where the norm has been tacitly acquiesced in, indicating a weaker emotional engagement that may turn into indifference. Finally, allegiance may have more the character of a submission. There is no positive commitment towards the ultimate norm, perhaps there is even a sceptic attitude, but the norm is acquiesced in as no realistic alternative is thought to be present. Allegiance is thus a wide concept which does not coincide with the full and unreserved embracing of those values that the norm is to guarantee.⁶⁴ As such the concept of allegiance could be accepted by functionalists and conflictualists alike. For the conflictualist the dispossessed classes acquiesce in or submit to the fundamental principles of government in a capitalistic state as long as they have not become conscious of their class interests and chosen the path of political organization.

As standard types of developed domestic legal systems admit a certain separation of the internal and external validity, making it possible to assert the existence or bindingness of a legal norm in spite of the fact that either the internal or external validity is defunct, this will not be the case with the legal systems of original simple societies where it is hard to distinguish between the different types of validity. Formal and psychological validity, that is legality and legitimacy merge into each other, as also do internal validity as such and external validity. When describing original societies as strongly cohesive, as do Durkheim, Chambliss and Hart, we mean that legal norms in such societies are both effective and profoundly internalized.⁶⁵

It would seem that the aspect of internal and external validity, as well as legality and legitimacy, are more closely interconnected in international law than is the case with highly differentiated domestic legal systems. Where for example a formally concluded treaty turns out to be seldom applied or constantly violated there will be good reason to believe that the treaty-based norms have been abandoned and that new customary norms are emerging. Some of the Hague Conventions did not become effective as the parties lost confidence in the norms that were expressed by them.⁶⁶ International law also provides examples where the absence of one kind of validity is remedied by the presence of another. If for example a treaty is concluded in violation of certain requirements set up under international law (the case of unconstitutionality, error, fraud, etc.) and thus lacking formal validity, the treaty may nevertheless become legally binding if the parties to the treaty wish to apply the treaty provisions in spite of the defects concerning its conclusion.⁶⁷ The external validity is at hand, but not the formal validity, which is replaced by the psychological validity. Here we find that formal and psychological validity may alternate.

The external validity is missing in the case where a *de jure* government has been ousted as a result of an uprising but continues to persist in exile. The legal government may nonetheless be guaranteed a certain status under international law, maintaining for example certain immunities and privileges and the right of legation, although it will generally be considered an ineffective body, having no territory or population to govern.⁶⁸ Apartheid, and racial discrimination are acts prohibited under international law. The view that these humanitarian obligations are still valid norms of international law continues to be widely shared in spite of the fact that these norms are regularly violated. When we come to the ultimate norms of international law relating to the sources of international law, the external and the internal validity do converge. Treaties are universally considered to express norms of international law and they are in fact referred to when invoking an international legal norm in a particular dispute. We encounter the same convergence of external and internal validity in the case of the ultimate norms of national legal systems.⁶⁹

Legal regulation has the peculiarity that it tends to grow and extend to areas hitherto unregulated. This diffusion of regulation does not concern only the various forms of individual conduct or state activities, but also has a 'reversible dimension' as it additionally concerns the very basic assumptions upon which the legal regulation is built. In international law there has been a constant tendency to extend regulation to embrace the rational activity of establishing the existence of valid norms, qualifying what is to constitute a treaty and what is to constitute international custom, and further what is to constitute a source of international law.⁷⁰

There has occasionally been a desire to eliminate the psychological aspect from the study of legal systems. This is noticed in the efforts to conceive internal validity as plainly a formal kind of validity, eliminating any involvement of the psychological aspect. The purely formal nature of internal validity may be saved if self-reference of the ultimate norms is accepted. Ross in his analysis of article 46 of the Danish Constitution states that the rules on the amendment procedure of the Danish Constitution cannot logically be applied to their own amendment. That the parliamentarians follow the same procedure for the amendment of the amendment rule is not due to the fact that there is such a valid rule stipulated by the Constitution itself, but because the Danish parliamentarians have *de facto* followed an identical procedure out of convenience.⁷¹ Ross thus assumes there to be a norm external to the Constitution which is valid because it is actually applied by the Danish Folketing and believed to be the correct one. This rule is valid because it fulfils the condition of external validity being effective and the internal validity, in the psychological sense, being accepted as the right procedure.

Hart, on the other hand, denies the assertion of Ross that self-reference is logically unacceptable. Norms may well be self-referring and this need not be questionable on logical grounds provided the norm is not empty of any content. This requirement is fulfilled if the ultimate norm of amendment does not exclusively refer to itself but also to other norms.⁷² Of the two kinds of self-reference, total and partial, only the first category is logically unacceptable. However, cases of total self-reference are very few and of interest exclusively in philosophical discourse.⁷³ Constitutional norms on the amendment proce-

ture belong to the class of partially self-referring stipulations. Norms of amendment concern every provision of the constitution including itself. Sundby, who also shares the view that self-reference of ultimate norms is possible, reformulates § 112 of the Norwegian Constitution on the amendment procedure as three separate prescriptions:

1. §§ 1–111 of this Constitution may be amended by the Storting with 2/3 majority.
2. In the same way the rule under 1. may be amended
3. In the same way rule under 2. may be amended.⁷⁴

In accordance with rule 3 the Norwegian Storting may change the procedure for altering the amendment procedure, by stipulating for example a larger majority under rule 2. This is according to Sundby a satisfactory reformulation of § 112. The sequence may be unlimited without being logically dubious.⁷⁵ However, a sequence of three is completely satisfactory in the case of the ultimate norms of competence.⁷⁶

As stated above the efforts to prove that self-reference is logically possible may be motivated by the desire to place internal validity completely on a formal basis excluding any psychologically tainted element.⁷⁷ This is not achieved by simply proving that self-reference is unequivocally required by the ultimate amendment norm itself. This will hardly be the case. Those in charge of applying the constitution and the amendment rule will normally not explain why they apply the same procedure as indicated by the amendment provision. It will therefore be difficult to argue that they do it because they think it to be required by the constitution itself, or because they are simply convinced that this is the most appropriate and correct way to do it. Irrespective of whether the amenders consider that they are implementing a system-external rule to the system-internal amendment rule or the system-internal amendment rule to itself, we will simply not be able to avoid the psychological element. In both cases we may say that a valid norm is in operation, being both externally and internally valid. In the first case internal validity, being of the psychological kind, means that the amenders are convinced that an identical but not constitution-based procedure is required and correct. In the second case it means that the amenders have accepted that the ultimate norm of amendment is self-applying.

We also find problems of self-reference of ultimate norms in the realm of international law, not least with regard to the norms referring to the sources of international law. The norms of the Vienna Convention on the Law of Treaties relate to the creation, operation, alteration and termination of norms of conduct for states by means of treaties. The question arises as to the application of certain of these norms to the Vienna Convention rules themselves. A partial self-reference could well be conceivable with respect to most of the Vienna Convention rules. We may only mention the rules of amendment, termination, reservations and interpretation. The possibility of self-reference may though be circumscribed by the general principle of non-retroactivity. Article 28 of the Convention reiterates the principle of customary law that treaties are not to have retroactive effect as to acts or facts having taken place

before the date of entry into force of the treaty.⁷⁸ It is presupposed that a treaty itself may accept a derogation from this rule. Article 24(4) again mentions certain general exceptions to the principle of non-retroactivity. Provisions relating to the authentication of a treaty text, the establishment of the consent of states to be bound by the treaty, the manner and date of the entry into force of the treaty, reservations, the functions of the depositary and other similar matters apply from the date of the adoption of the text.⁷⁹ How these rules on the temporal application of treaty provisions affect the application of the Vienna Convention rules must be evaluated in the light of article 4 concerning the temporal application and non-retroactivity of the Vienna Convention rules. According to this article "... the Convention applies only to treaties which are concluded after the entry into force of the present Convention..." This wording would as such suggest that the substantive norms only apply to treaties that are concluded after its entry into force. The term 'conclusion' stands for the various steps in the procedure that lead from the commencement of negotiations through the presentation of full powers to the adoption and authentication of the text, to giving one's consent to be bound by the treaty and its final entry into force. The term 'conclude' is ambiguous as it may either be understood to refer to the sum of steps leading from the initiating of treaty negotiations to the final entry into force of the treaty, or to the separate steps that form part of the treaty-making procedure.⁸⁰ Here the choice of the expression 'are concluded' instead of the expression 'have been concluded' would evidence that the Vienna Convention could not apply to a treaty where any of the steps in the treaty-making procedure had been entered into before the date of the entry into force of the Vienna Convention, i.e., 27 January 1980. The result of this would be that self-reference of the Vienna Convention would be excluded because of the rule of non-retroactivity under article 4. It does not seem possible to assert that the Vienna Convention is concluded after its entry into force, because all the steps of its conclusion have taken place before its own entry into force. It has to be pointed out that article 4 takes note of the possibility that norms expressed in the Convention may well operate in their possible quality of customary norms of general international law. The only trouble is that opinions may differ as to which rules of the Vienna Convention are clear codifications of customary law.

In the present work the question of self-application of the Vienna Convention will be of relevance with respect to reservations. A restrictive formal reading of the Convention provisions would lead to a negative answer.⁸¹ The final provisions of the Vienna Convention are sparse and concern only the signature, ratification, accession to, the entry into force of, and the authentic texts of the Convention. These rules necessarily become effective from the date of the adoption of the Convention text. Though there are no final provisions regulating the formulation and operation of reservations that would be formulated to the Vienna Convention, it does not mean that the framers were neglecting this question. The matter was in fact discussed during the Vienna Convention in 1969. Within the Committee of the Whole it was stated that in the absence of any provisions regulating the formulation of reservations to the Vienna Convention, the rules under the substantive articles 19 to 23 were to be applied to such reservations.⁸² This view was not contested and is presumed to

have been shared by the other members of the Committee of the Whole. The idea of specific provisions on the formulation of reservations to the Vienna Convention was disliked because of the possible confusion this would create. If the rules on reservations to the Vienna Convention were identical with the rules under 19 to 23, they were believed to be unnecessary. If they were to be differently formulated this would result in confusion and "unacceptable contradiction".⁸³ Opinions uttered during the preparatory stage of concluding a treaty have feeble authority but they may still provide reasons which speak in favour of the assumption of a meta-metanorm requiring the substantive reservation rules of the Convention to apply to reservations formulated to the Convention itself.⁸⁴ The Committee of the Whole of the Vienna Conference constituted an authoritative body with representatives from all the negotiating states. A closer look at the reservations formulated to the Vienna Convention and the reactions by the other states strengthens the assumption that the contracting states consider that the Convention rules on reservations should also apply to reservations presented to the Convention.⁸⁵ Even if the preparatory work has been formally recognized only to have a secondary role for treaty interpretation, reasons of expediency are a strong argument for self-application of the Vienna Convention rules with regard to reservations.

If a state was to formulate a reservation to one of the rules on reservations of the Convention, for example the rule on tacit acceptance modifying the time limit for presenting an objection, this reservation would be governed by the reservation rules of the Convention with the exception of the rule on tacit acceptance. If an objection was made to such a reservation and the reserving state questioned the value of such an objection because it had been made after the time limit indicated by the reservation (or perhaps the time limit of 12 months established by the Convention) we would have a dispute that would fall outside the regulation of the Convention and which could not be settled on the basis of the Vienna Convention. A solution would have to be looked for outside the Vienna Convention perhaps by invoking and proving the existence of a customary norm. A similar case would be present, where a state would enter a reservation to the compatibility requirement and where another contracting state would object to the reservation considering it to be incompatible with the object and purpose of the Vienna Convention. We are also in this case facing a situation where a dispute falls outside the regulatory force of the Vienna Convention.⁸⁶

CHAPTER 8

THE LINGUISTIC CONCEPT OF NORM

As we have seen the two perspectives for looking at the phenomenon of legal norms, the atomistic and the systemic have to cope with a certain number of dilemmas.¹ No definition of the individual legal norm has provided to be comprehensive enough, marking neatly the borderline between other kinds of social norms. It would seem impossible to distill the criteria that distinguish legal norms from other kind of social norms. However, there is an abundance of accompanying characteristics whose presence provides good reasons for assuming the existence of valid legal norms. Nor does the systemic apprehension of legal norms as such suffice for distinguishing legal from other social norms. The rules of private associations, sports clubs and big enterprises all produce a mass of ordered regulations, comprising both primary and secondary norms. Such bodies also co-operate on the national and international level with bodies pursuing identical activities, which will affectuate an increased agglomeration of new rules constituting a larger system of interrelated norms.

For the further purposes of this study it will be necessary to concentrate on some aspects, which will not actually provide the distinguishing criteria of legal norms, but which nevertheless are fruitful in approaching the study of legal norms. 1) Legal norms have the quality of being communicable. In order to become operative they must by necessity be communicated. 2) It must further be reiterated that legal norms do guide human behavior. They may be directed towards physical conduct, and also towards the more subtle forms of mental activity: reasoning and justification. Legal norms are basically a relational concept. It will not be enough that the sender conceives what is transmitted as a prescription, it is also essential that it is received by someone who apprehends and recognizes it as a prescription.² 3) Thirdly, the peculiarity of legal norms is that they do not simply constitute an agglomeration of norms, but that they are in a very complex way interrelated with each other. The quality of being part of a system is in spite of not being a distinguishing feature still a very crucial one.

8.1 THE COMMUNICATIVE FEATURE OF NORMS

Legal norms as social norms regulate interaction among human beings. Thus information about them is supposed to be somehow transmitted. The transmission of information about legal norms occurs by the means provided by language, either literal or oral. Norms may be transmitted by a large variety of symbols, being anything from a gesture by the traffic police, to the firing of a warning shot by a naval vessel at a foreign ship having entered a safety zone established within the territorial waters of a state. In developed societies the authoritative transmission of legal norms is basically tied to the written form.

Although linguistic explications of legal norms appear by now to be stale stuff, it will nevertheless be advisable to recall certain central notions relating to the modes of language used in human interaction. When language is used for communication, phonemes and morphemes will be combined to words and expressions ordered into sentences. Ideas are expressed by building these sentences from the words belonging to the vocabulary according to the instructions of syntax. However, as Searle points out the "... unit of linguistic communication is not the symbol, word or sentence, but rather the issuance of the symbol, word or sentence in the performance of the speech act".³ Sentences when used constitute human actions. They are tools with the help of which the various *speech acts* are performed. Any invocation of a sentence does as a rule constitute three different kinds of acts.

The first type of speech act is of a physiological nature and consists in the producing of sounds or the making of marks. In other words we commit phonemic and morphemic acts which form *utterance* or *locutionary acts*, following the terminology introduced by J.L. Austin and developed *inter alios* by Searle.⁴

The uttering of a sentence will have a certain effect which may be physical or psychological. *By* asking us to show our luggage the customs officer makes us open our suitcase and experience a feeling of unease. *By* giving his opinion the legal counsel of a Foreign Office succeeds in making his government abstain from certain reprisals against another government. The effects may be natural, the shouting of "Fire!" will make another person push the fire alarm. They may also be conventional, the presentation of a bill will lead to the initiation of a long and complex procedure involving a number of individuals and groups.⁵ By uttering a certain sentence we achieve a certain reaction and a *perlocutionary act* is performed.

The third category of speech acts is for our purposes the most interesting one. A locution is assigned a specific function. It is used in order to create a certain effect. The utterer uses the sentence in a certain context under certain conditions with a certain intention.⁶ *In* saying something the utterer performs an act that is distinct from the locution itself and the achieving of a certain effect. The utterance may constitute the making of an assertion, the asking of a question, the issuing of an order, the expressing of a wish, the announcing of a verdict, etc. A speech act is *illocutionary* because it constitutes a meaningful act. The meaningfulness of the act lies in making the hearer recognize and understand the intentions of the utterer.⁷ The illocutionary act has been characterized as forming a link between the locutionary presentation and the perlocutionary effect. To distinguish between the illocutionary and the perlocutionary act may from time to time prove to be a difficult task.⁸

Illocutionary acts may be dissected into: The *propositional content* and the *illocutionary force*.⁹ The propositional content stands for a possible state of affairs of social relevance.¹⁰ Within the content Searle distinguishes further between the "referential" part and the "predicative" part. An expression that identifies something, a thing, an act or an event, is referential. The expression that tells us something about the thing, the act or the event, is predicative.¹¹ The force puts the content in a particular communicative context, the content is presented in a specific way. The presence of a certain

state of affairs is asserted, its occurrence in the future is predicted, its prevalence is wished, its realization is demanded, etc. Illocutionary acts are propositions. Indicative sentences are used to express theoretical and descriptive propositions, which may either be true or false. Normative sentences are used to express directive and qualificative propositions, i.e., *prescriptions*.¹² Prescriptions are neither true nor false, but they may be appropriate or inappropriate, depending on whether they are able to influence the conduct of those they are addressed to, the hearer or reader. A prescription formulated in Amharic and addressed to an Assamese will probably not be understood and therefore not capable of influencing the hearer so as to comply with the message. A prescription whose content embraces an act which is impossible to be carried out by the addressee would be inappropriate.¹³ Prescriptions are intended to guide and influence human activity, be it physical conduct or intellectual argumentation, which in its turn will have an impact on physical conduct. Where prescriptions are said to be directive, they indicate the situation and the physical act required in that situation. They direct conduct. Where prescriptions are qualificative they may be termed *qualifications* and do affect in the first place mental activities. Qualifications may be of at least three different kinds. They are identificatory if they establish identity between two phenomena. They are classificatory when referring a number of phenomena to a certain class. A qualification is implicatory where the presence of a state of affairs will be a reason for asserting the presence of another state of affairs.

Qualifications may be general as is the case when enumerating treaties and international custom as sources of international law. Or they may be particular. The geographical determination of a certain line by an *ad hoc* court of arbitration qualifies for a binding delimitation of the continental shelf between two opposite states.¹⁴

8.2 THE CONSENTIVE FEATURE OF LEGAL NORMS

Normative (directive and qualificative) propositions or prescriptions must not be identified with norms, although they may develop into norms under certain conditions. Uttering the normative proposition: 'Do act x!' does not mean that a norm is transmitted. To say that a norm 'exists' or is effective and valid is to state that the prescription affects our conduct and that it does so because there is a feeling of compulsion to do it. This mental attitude towards the prescription or the psychological element has been designated in various ways. The most widely used term is *internalization*.¹⁵ The internalization may be of varying strength, from express and declared acceptance, over silent acquiescence to resigned submission.¹⁶ The requirement of internalization or internal commitment cannot be rigorously upheld with regard to legal norms. The absence or restrictions of internalization has been remedied by the formal validity of the individual legal norms. A commitment to the legal norms is assumed owing to the fact that the norms have been created according to a certain formalized and authoritative procedure. The necessity of internalization actualizes with regard to the ultimate norms from which the primary norms of conduct derive their formal validity.

8.3 THE SYSTEMIC FEATURE OF LEGAL NORMS

An important feature of legal norms is that they are interrelated with each other in manifold ways. These interrelations are to a very large extent formalized. A familiar and widely propagated distinction divides legal norms generally into primary norms that regulate conduct and secondary norms that regulate the creation or the operation of these primary norms of conduct. The structure of the ordered body of legal norms can be conceived in either genetic or operative terms. Relations between legal norms are genetic where the emergence of primary norms may be traced back to another norm, a secondary legal norm. This secondary legal norm regulates bindingly the procedure for the formation of the primary norm and it helps us to determine if the primary norm fulfils the condition of internal validity in its formal sense. Raz's view that the genetic relations are of lesser interest may be easier to accept with regard to the inquiry into domestic legal systems.¹⁷ The interest in the genetic relations ought to be more marked in international law where questions of the validity of international legal norms arise more easily. A penetration of the genetic structure of a legal system will make it possible to follow the creation, change and termination of individual norms and help us to prove the existence of a legal norm.

Looking at the operative structure of a legal system makes us concentrate on the relation between primary norms of conduct and those secondary norms that facilitate the implementation of the primary norms. Norms that regulate the operation of other norms help solve problems of various kind. They help to treat what Alchurrón and Bulygin call defects of the norm system: They fill *normative gaps*, which is the case when no norm has been formulated to regulate the instant subject matter.¹⁸ They settle *inconsistencies* within the legal system, when two norms refer to the same operative facts but where their simultaneous implementation would lead to irreconcilable results. Secondary norms may also help to fill the so-called *gaps of recognition* where semantic difficulties arise due to deficiencies in the formulation of primary norms.¹⁹ Rules of interpretation are secondary norms that help to identify norms where legal texts are hampered by semantic impreciseness.

The division of legal norms into norms of conduct, and norms of creation and operation is common to analytical jurisprudence though the refinement of this idea has led to slightly different results. Hart distinguishes between rules of obligation and rules of recognition, change and adjudication.²⁰ Raz distinguishes between duty-imposing and power-conferring norms.²¹ The latter are either regulative or legislative depending on whether they refer to norms of duty already existing or to norms of duty created by the power-conferring norm itself.²² Ross speaks of norms of conduct and norms of competence.²³ Sundby refers to the two broad categories of norms of duty and norms of qualification. Norms of qualification constitute a broad group. Norms of competence according to him form a subcategory within the class of norms of qualification.²⁴

CHAPTER 9

THE DEONTIC STATUS OF LEGAL NORMS

9.1 THE DEONTIC STATUS OF NORMS OF CONDUCT

Norms of conduct are either *orders* (active duties), *prohibitions* (passive duties) or *permissions*. Raz would not accept permissions to be norms due to his conception of norms being sanctioned. Permissions as well as rights are, according to him, *laws* but not *legal norms* because they are not backed by sanction.¹ As norms in the present work will be given a broader meaning, permissions will be accepted as norms proper.²

Deontic logic has considered its main task to interdefine the concepts of order, prohibition and permission. Order and prohibition are contrary concepts. An act cannot be ordered and prohibited at the same time. Permissions may be defined in two ways. The simpler definition identifies a permission with the absence of prohibition. On the basis of the primary concept of order the two other concepts may be defined in the following way:

Op = p is ordered

Fp = p is prohibited

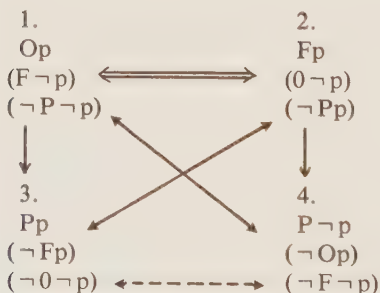
Pp = p is permitted

$Fp = O\neg p$ = there is a duty not to do p

$Pp = \neg Fp$ = there is no prohibition to do p

$\neg O\neg p$ = there is no duty not to do p

The three interdefined deontic concepts may be arranged into an oppositional square as proposed by Prior in order to clarify the interdependence of these concepts.³



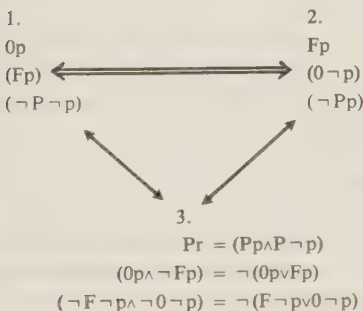
Norms belonging to categories 1 and 2 are *contrarian*. It is not the case that p is both ordered and prohibited at the same time. Or it is not the case that there is at the same time an obligation to do p and an obligation not to do p . However, it may be that p is neither ordered nor prohibited. Norms belonging to categories 3 and 4 are *subcontrarian*. It may be that there is both a permission to do p and a permission not to do p . However, it is not the case that there is at the same time neither a permission to do p nor a permission not to do p . Norms belonging to categories 1 and 4, respectively 2 and 3, are *contradictory*. Either p is forbidden or p is permitted, but it can not be both at the same time. It is not the case that there is at the same time an obligation not to do p (to do p) and a permission to do p (not to do p) and neither is it the case that there is no permission to do p (not to do p) and no obligation not to do p (to do p). A norm of category 1 implies a norm of category 3 and a norm of category 2 implies a norm of category 4. If p is ordered it necessarily follows that p is also permitted.

The negation of the prohibition to do p results in the permission to do p , but it does not logically follow from this that even the not doing of p would be permitted. Similarly, the denial of an order to do p amounts to a permission not to do p , but leaves unanswered the question whether the doing of p is equally permitted.

In ordinary language we do not understand permission in this limited sense as being either the freedom-from-an-order or the freedom-from-a-prohibition. Instead it is generally understood that both the negation of an order and the negation of a prohibition result in a permission to perform a certain act, or abstain from doing it. Permission is not simply the freedom to do the opposite to what is demanded, but a freedom to choose between doing or not doing the relevant act. Instead of the *oppositional permission* we assume there to be an *optional permission* or a *free choice permission*.⁴ The free choice permission may be expressed by the following conjunction:

$$Pr = Pp \wedge P\neg p = \neg Fp \wedge \neg Op = \neg Op \wedge \neg Fp$$

This free choice permission or *liberty* would thus be the conjunction of an active permission (Pp or a freedom-from-prohibition permission) and a passive permission ($P\neg p$ or a freedom-from-order permission).⁵ The former conceptual square would thus turn into a triangle:



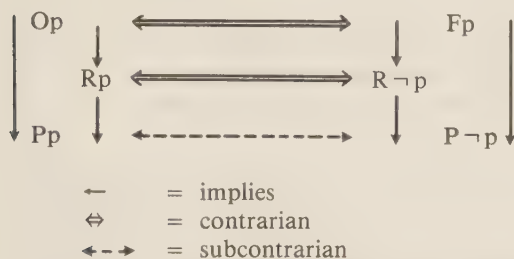
Category 3 is contradictory to both category 1 and 2. If we deny that there is an order to commit act *p* we consider there in the first hand, to be a freedom to abstain from doing *p*. We will also be ready to accept that one may be free to do *p*, if one so chooses. We will think similarly if there is a denial of a prohibition to do *p*. However, in the case where we deny that there is a liberty (free choice permission) it will depend on the concrete situation what effect the denial will have. If a person intends to do *p* and this freedom is denied by someone else, the latter is assumed to be invoking a prohibition to do *p*. If a person does *p* believing himself to have an option to do *p*, whereas someone else is of the view that there is a duty to do *p* the question will hardly become an issue. In international relations among states it does not infrequently happen that a state will explicitly proclaim that it undertakes an act because it has an option, a liberty, to do so, where another state considers the same act to be obligatory. The reason for such a proclamation is to ward off any future efforts to interpret this action to constitute an acquiescence in the obligatoriness of the act.

Deontic concepts have been generally conceived as being dichotomous and not as being gradual, not providing for any kind of quasi-obligations. Sundby who accepts deontic concepts only to be dichotomous, discusses the question of recommendations by international organizations to member states. The Nordic Council may for example according to article 45 of the revised 1962 Helsinki Convention on Nordic Co-operation adopt recommendations to the member states. According to Sundby such recommendations would amount to active duties.⁶ However, it must be stressed that this duty has not as its content the subject-matter indicated by the recommendation. It concerns some completely distinct act, namely the undertaking of certain measures to investigate possibilities of realizing the aim of the recommendation. The recommendations of the Nordic Council have to be transmitted to the competent government authorities and these have to consider the possibilities of realizing the recommendation. Because this duty is not expressed by the formal recommendation itself, it has to be construed independently. Article 65 of the Helsinki Convention stipulates a duty to report on measures taken pursuant to recommendations. This duty to report in combination with the very aims of the Nordic co-operation presupposes a duty to deal with a recommendation.⁷

Turning back to the very object of a reservation: Saying that an act *p* is recommended implies that *p* is not prohibited or that *p* is permitted. It is further generally recognized that recommendations do not constitute orders. However, a recommendation strives to be more than a simple permission and signifies that it would be desirable that *p* be ordered. As traditional jurisprudence tends to divide the sphere of legally regulated actions exclusively into liberties and duties it considers the recommendation to perform act *p* to be more a political commitment than a legal duty.

The relations between duties, recommendations and permissions may be clarified in the following way without intending to interdefine these concepts. That *p* is recommended is not equivalent to saying that there is an active duty with respect to *p* ($\neg(Rp = Op)$) and clearly not equivalent to a passive duty ($\neg(Rp = Fp)$). That *p* is recommended does not imply that *p* is ordered

$(\neg(Rp \rightarrow Op))$ and evidently not that p is prohibited $(\neg(Rp \rightarrow Fp))$. It holds true that once p is ordered then p is also recommended $(Op \rightarrow Rp)$ and also permitted $(Op \rightarrow Pp)$. It will not be possible to state that the recommendation to perform p is equivalent to the permission to do p $(\neg(Rp = Pp))$. That p is recommended would imply that p is also permitted $(Rp \rightarrow Pp)$, but the permission to do p does not imply that p is also recommended $(\neg(Pp \rightarrow Rp))$. Logically seen a recommendation is situated somewhere between a duty and a permission.



Active and passive recommendations resemble orders and prohibitions because they are contrarian. The performing of act p and the not performing of act p cannot be recommended at the same time.

Recommendations contain a dynamic force. The recommendation to do p may turn a permission not to do p into an order to perform p . A recommendation not to do p may turn a permission to do p into a prohibition to perform p . Similarly recommendations help to change orders and prohibitions into permissions.

Where a recommendation envisages a legislation prohibiting act p , the content of the recommendation is not p but Fp and the recommendation would have to be formulated $R(Fp)$. A norm forms here the content of another norm, providing that we accept recommendations to be norms. At least this will be the case where there is a duty to legislate with respect to p .

9.2 THE DEONTIC STATUS OF NORMS OF COMPETENCE AND QUALIFICATION

Norms of competence and other norms of qualification are secondary norms usually distinguished from primary norms of conduct. These secondary norms are necessary to make the agglomeration of individual norms of conduct turn into a system of norms. One attempt to clarify the distinction between primary norms of conduct and secondary norms of qualification is to assert that the former regulate the conduct of individual subjects whereas the latter refer to the mental activity of argumentation. Indirectly the norms of qualification also affect the conduct of individual subjects.⁸ The view that argumentation or reasoning is a certain kind of conduct has also been propounded.⁹

Qualifications are, as already mentioned, of various kinds.¹⁰ They may establish the identity between two expressions or notions. Stipulative definitions of the analytical kind are such *identificatory* qualifications. Identificatory qualifications abound in international law. As an example the

following definition of the crime of genocide in article II of the 1948 Genocide Convention may be cited.¹¹ The definition being partly analytical partly denotative identifies the crime of genocide with:

“any of the following acts committed with the intention to destroy, in whole or in part, a national, ethnical, racial or religious group, as such;

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.”

Classificatory qualifications that refer a certain phenomenon under a generic term may be very close to identificatory qualifications. In the case where we would amend the above-mentioned definition referring two more specified acts to the five instances already enumerated in the definition, this would amount to a classificatory qualification. These two new categories of acts do not constitute the whole of the genocide concept but are only instances of genocide. Qualifications may be *implicatory*. If a certain state of affairs is present, then another state of affairs may or ought to occur or be present. Article 49 of the Vienna Convention on the Law of Treaties stipulates that if the conclusion of a treaty has been achieved by fraudulent behavior by one of the party, the other party may declare the treaty void.

Sundby separates the norms of competence to form a distinct subcategory on the norms of qualification. Norms of competence qualify, according to him, acts undertaken by certain individuals or certain collective bodies following certain settled procedures as valid norms of conduct.¹² Norms of competence regulate the creation, alteration and termination of primary norms. Norms of competence are of the implicatory kind. The occurrence of a certain set of acts implies that a primary norm of conduct has been created.

Raz's distinction between regulative and legislative power-conferring norms is followed up by Sundby within his “material norms of competence”.¹³ Regulative norms refer to norms of conduct, duties already existing. Legislative norms do not refer to pre-existing duties but refer to duties created by themselves.¹⁴ Contracts for example both create and regulate duties. Sundby characterizes his norms of conduct “norms of duty” as regulative and his norms of qualification as constitutive, a pair of terms that is strikingly similar to the distinction between regulative and legislative norms.¹⁵ Sundby's terminology introduces a certain confusion. How would he characterize rules of interpretation? Being norms of qualification they are not regulative but constitutive, but because they refer to pre-existing norms of conduct (or “norms of obligation”) they are regulative and not legislative.¹⁶ Although he mentions certain exceptions from the contention that norms of qualification are constitutive, rules of interpretation have not been mentioned as being one of them.¹⁷

A question that has preoccupied legal theorists is to what extent the distinction between norms of conduct and norms of qualification (compe-

tence) is necessary. It would seem that in principle there would be no impediment to resort to some kind of reductionism. The view has also been propounded that norms of qualification could be reduced to norms of conduct.¹⁸ Norms of qualification may well be conceived of in terms of duties, or permissions to consider two phenomena to be identical, or one phenomenon to belong to a particular class, or one state of affairs to follow from the presence of another. On the other hand, norms of conduct could be reduced to norms of qualification. We may take for example the norm of conduct in article 15 of the Convention on the High Seas prohibiting acts of piracy. The crew of a private ship has the duty not to commit any act of depredation for private ends against another ship on the high seas. This norm may well be translated into a norm of qualification stating that an act of depredation for private ends against another ship on the high seas committed by the crew of a private ship is an act of piracy. It may further be contended that an act of piracy having taken place, a crime under international law has been committed. A crime under international law having taken place, international responsibility will ensue.

Which kind of reductionism one may favour will depend on the purposes one is trying to achieve. Depending on our choice between looking at norms from the point of view of the norm-receiver or the norm-implementer or systematizer we will prefer one kind of reductionism to the other. Choosing the view of the subject that is supposed to comply with the norm, we will prefer to look at all norms as norms of conduct. If we are looking at the norm from the point of view of a judge implementing norms or a scholar who identifies and systematizes them, it would seem more appropriate to look at all norms as norms of qualification. Having proved that a person has done act p in situation X we are justified, permitted or obliged to assert that he has violated a norm. A number of persons having undertaken acts q, r and s in situation Y makes us assume that a valid norm of conduct has been created.

The distinction between norms of conduct and norms of qualification would not seem to be a necessary one. However, it may have the function of underlining the differentiation of the legal system and showing the two-sidedness of the concept of legal norm. Norms guide conduct and provide standards for evaluating this conduct.¹⁹ Even if we maintain the distinction between norms of conduct and norms of qualification, the latter may also be imbued with a deontic status. Legal definitions as being usually conceived as qualificative norms are intended to be binding. If we are facing one of the five acts indicated above in the Genocide Convention we are obliged, when applying the convention, to consider each of these acts as constituting a crime of genocide.²⁰ Rules of interpretation may be compulsory or facultative. Article 31 of the Vienna Convention on the Law of Treaties creates an obligation ("A treaty *shall* be interpreted . . ." (emphasis added)) to consider the text, the context, and the object and purpose of the treaty when interpreting the individual provisions. Article 32 seems to provide for an option ("Resource *may* be had . . ." (emphasis added)) to resort to the preparatory work under certain conditions. Treaty law distinguishes between conditions that may invalidate a treaty (conditions of voidability as enume-

rated in articles 46 to 50 in the Vienna Convention) and conditions that will invalidate the treaty (conditions of absolute invalidity as mentioned in articles 51 to 53 of the Vienna Convention). Where a treaty is voidable a party is at liberty to consider the treaty as either invalid or valid.²¹ In the latter case the treaty is *ipso facto* invalid and the other parties are obliged to consider it being without effect.

CHAPTER 10

THE INTERSUBJECTIVITY OF LEGAL NORMS OR THE
CORRELATIVITY OF LEGAL RELATIONS

Legal norms, and more markedly so the norms of conduct, affect the relations between individuals and collectivities. By regulating the relations between two parties, norms confer rights on one party and the corresponding obligations on the other party. Rights and obligations seem to be two inseparable aspects and constitute two sides of the same legal phenomenon. A legal norm has a prospective bearing. A person having a right may commit the relevant act in the future without being obstructed. Other persons will have the obligation to tolerate the doing of this act. The norm has also a retrospective bearing. A person having acted on the basis of a right will be protected against any challenge of this act. Another person will have an obligation not to resort to any measures that would nullify the act.

Speaking simply of legal relations in terms of rights and obligations has since Hohfeld's work in 1923 been considered as a too superficial description of legally regulated relationships.¹ Accepting the interdefinability of rights and obligations already propagated by Bentham and Austin, Hohfeld develops the idea further by distinguishing between four categories of rights and four categories of obligations.² The four categories of rights are 'claims', 'privileges', 'powers' and 'immunities', the four correlate categories of obligations are 'duties', 'no-claims', 'liability' and 'disability'. The terminology has been modified by later writers developing further the idea of correlativity of relations. Adhering to the terminology introduced by Ross and Feinberg we will get the first-order relations: *Claim-rights* – *duties* and *liberties* – *no-claims*; and the second-order relations: *Competence* – *subjection* and *immunity* – *disability*.³ For reasons of clarity the relations may be presented in the following way as correlates:

CORRELATES

	A	A	A	A
RIGHTS	claim-right	liberty	competence	immunity
and	↑↓	↑↓	↑↓	↑↓
OBLIGATIONS	duty	no-claim	subjection	disability
	B	B	B	B

The duty of a person B to commit act p is correlated with a claim-right by another person A towards B to commit p. The competence of A to bring about a legal change correlates to the subjection or the obligation of B to recognize this legal change as binding. Similarly if A is at liberty to do p, B will not have any right to claim that A should do p or abstain from doing p.

With the distinction between first-order relations and second-order relations we are brought back to the familiar distinction between primary norms of conduct and secondary norms of competence. As the first-order concepts refer to modes of conduct, the second-order concepts refer to modes for bringing about changes in first-order legal relations, which may occur through statutes, instructions, contracts, wills, etc.⁴ When speaking of some particular right we usually understand this right as a conjunction of various relationships. The competence to modify first-order legal relations is usually combined with a claim-right to urge that the dispositions affected by the exertion of the competence are to be respected. An international organization having decided upon the apportionment of its expenses between the member states will also have a claim-right to demand the payment of such a share.

The concepts of legal relations may not only be looked upon as correlates but also as opposites in the following way:

OPPOSITES

	A	B	A	B
RIGHTS	claim-right	liberty	competence	immunity
and	↕	↕	↕	↕
OBLIGATIONS	no-claim A	duty B	disability A	subjection B

If the presence of a claim-right is denied it follows from this that there is no claim or a 'no-claim', and correspondingly the other party in the relationship does not have any duty but is at liberty with respect to the relevant act. Similarly, a limitation of the scope of the claim-right results in the corresponding widening of the scope of no-claim for one party, and the corresponding limitation of the duty of the other party results in the enlarging of the scope of its liberty.

Although Hohfeld believed that his scheme of jural correlatives and opposites would exhaustively explain how relations are legally regulated (the operation of norms as creators of rights and obligations), some legal phenomena are not satisfactorily covered and explained by this scheme.⁵ Some of the examples intended to illuminate the defects of the Hohfeldian scheme may be ill-chosen. One example presented is the right to vote where it has been contended that no correlate obligation may be identified.⁶ However, the right to vote could be explicated with the help of Hohfeld's concepts. A voter will have a claim-right to participate in the act of voting and have his ballot-paper counted. As well as a claim-right against the various officials supervising the elections, he may also have a claim-right as to the other citizens not to obstruct his participation in the ballot. The voter may also be at liberty to choose between giving and not giving his vote. Some states do prescribe a duty to vote in their constitutions and thus there is a prohibition against the abstention from voting.⁷ The right to vote could equally be construed as a competence. The officials and the co-citizens have an obligation to subject to the consequences the vote may bring about. This

one vote may be crucial for bringing about the shift in government. The right to vote could also be understood as an immunity from any measures by the authorities to instigate regulations that would encroach upon a citizen's right to vote. The right to vote may be said to belong to those complex concepts, which are actually a collection of various rights and correlating obligations. Asserting that a right to vote correlates to various obligations is not correct. However, there are other, more convincing examples of the limitations of the Hohfeldian concept of jural relations.⁸

The question arises of how far the deontic concepts of order, prohibition and permission may apply to the concept of legal relations, the jural correlates and the jural opposites.

In the case of duties these may be active, or orders compelling a person to do act p. They may be passive, or prohibitions obliging a person to refrain from doing p.⁹ Liberties are optional permissions, or a legal freedom to choose between doing or not doing an act p. The obligation of subjection amounts to an obligation to comply with a decision. An immunity would in its turn have the character of an optional permission. If a decision is taken by someone not having the necessary competence to do so, another person may be free not to recognize (or to recognize) the decision as valid and binding. A claim-right can be conceived as a permission to make use of this claim-right or not to make use of it. A creditor will have the choice of initiating legal proceedings for the recovery of the debt or not to do so. A no-claim could evidently be understood as a prohibition to present a claim. A claim is usually brought forward in the belief that it is justified. If a court rejects a claim, the consequences may be the payment of expenses incurred by the respondent in connection with the legal proceedings. Once a claim has been definitely rejected, the claim-right is denied and there may be said to be a prohibition to present such a claim. A competence may be conceived as a permission to bring about or alter already existing legal situations. A competence may often be circumvented to mean only an active permission to bring about a change in connection with a prohibition to abstain from bringing about that change.¹⁰ The competence is in such a case not a free choice permission or liberty but an active duty, an order. A disability may be conceived as a prohibition to make a certain decision or to undertake a certain action.

CHAPTER 11

HOW RESERVATIONS AFFECT TREATY-BASED NORMS

The considerations in the preceding chapters will be the basis for analyzing the operation of reservations. The definition of reservation provided by the Vienna Convention mentions as the central criterion of reservations their special impact on the legal effect of the provisions of the treaty. It is submitted that the legal effect of a textual provision is the introduction of a norm. This means that the norms as formulated in the treaty provisions are the object of reservations. It is the norm that is altered and not the provision as such being only the formulation of the norm. Take for example the qualificative norm that is the legal definition of the term 'reservation'. During the Vienna Convention proposals were made to amend the definition so as to mention explicitly that reservations do beside their "excluding" and "modifying effect" also have a "restricting" or "limiting effect". This amendment would not have had the effect of altering the substance of the definition by widening its scope to embrace a third category of statements, because 'restricting' is a way of 'modifying'. If a state would have made a statement in accordance with the amendment, declaring that it accepts only a definition that makes explicit reference to the restrictive effect, this would hardly affect the qualification of a statement as a reservation, although it would be a reformulation of article 2 of the Vienna Convention. We have to be aware of the fact that the definition is defective for certain other reasons and would require a reformulation in order to dispel some major obscurities.¹

The crucial question is to determine how the 'excluding' and 'modifying' effects of reservations are to be apprehended. The drafters of the rules on reservations do not seem to have gone to the depth of the problem, probably assuming a common understanding of the terms 'exclude' and 'modify'. In the following an elucidation of these terms will be endeavoured on the basis of the views presented above on the concept of legal norms.

11.1 THE 'MODIFYING' EFFECT OF RESERVATIONS

We will start with the so-called 'modifying reservations' which are believed to be relatively sparse compared with the so-called 'excluding reservations'.² 'Modifying reservations' do not dissolve altogether the obligation (or right) that is expressed in a treaty provision, but permit it to prevail under modified forms. We may say that the subject-matter of the norm has undergone an alteration or, falling back on the linguistic term used earlier, that the propositional content has been changed. The state of affairs designated by the norm could be imagined to be altered in a quantitative or a qualitative way.

The first kind of reservation would be at hand when the content is altered by limiting the scope of obligations, letting the obligations cover only a part

of the original state of affairs, i.e., acts, events or situations. Examples of *quantitatively modifying reservations* may be drawn from the body of reservations formulated to article III of the 1953 Convention of the Political Rights of Women. According to this article parties to the Convention have a duty to guarantee that women on equal terms with men, and without any discrimination, shall be entitled to hold public office and to exercise all public functions established by national law. Now certain states have limited the categories of public office to which the duty of non-discrimination shall apply. Offices in the armed forces, the services charged with the maintenance of public order, certain functions within the national church and the top posts within the executive have been exempted from the class of offices covered by the obligation.³

A party to the 1972 European Convention on the Transfer of Proceedings in Criminal Matters has the competence to prosecute under its own criminal law any offence to which the law of another party state is applicable. The competence is to be exercised pursuant to a special "request for proceedings" set out in part III of the convention. A party may restrict this competence of another party and refuse the request for proceedings if it considers that the offence is a purely religious offence. Such a reservation is specifically authorized in Annex I para. (a). A state making use of this reservation restricts the scope of its own subjection and extends simultaneously its own immunity.

Reservations which restrict a norm of qualification have been presented to the 1954 Convention Concerning Customs Formalities for Touring. Article 1(b) defines "tourist" as:

"... any person without distinction as to race, sex, language or religion, who enters the territory of a Contracting State other than that in which that person normally resides and remains there for not less than twenty-four hours and not more than six months in the course of any twelve-month period, for legitimate non-immigrant purposes, such as touring, recreation, sports, health, family reasons, religious pilgrimages or business;..."

Reservations to this article exclude from the class of tourists persons who enter the country for business (Guatemala) or persons, who, in the course of their visit, accept any paid employment (Algeria, Egypt, Haiti, Senegal and Syria). The reserving states have therefore no duty to qualify these persons as tourists and the confronted states (not objecting) will find their correlate claim-right limited to the same extent.

Reservations which limit the obligations of no-claim and disability may also be found. An example of the former kind may be chosen from among the reservations formulated to the 1958 Geneva Convention on the High Seas. According to article 2(3) any state has the liberty to lay submarine cables or pipelines on the seabed, thus stipulating a no-claim for other states to impede such activities. Article 26(1) again creates a claim-right ("shall be entitled") for a party against any other party not to interfere with its laying of submarine cables and pipelines on the bed of the high seas.⁴ Other parties have a correlate duty to tolerate such activity. Iran presented on signature reservations to

these provisions, which were of the 'restricting' kind. The liberty under art. 2(3) and the claim-right under art. 26(1) to lay cables would not apply to that part of the bed of the high seas which constitutes a continental shelf. The no-claim inherent in article 2(3) is thus restricted in favour of a wider claim-right for the reserving state. The reserving state, Iran, would not only have a claim-right to forbid the laying of cables on the bottom of its territorial sea, but also on the bed of the adjacent continental shelf. For the other states this means a corresponding limitation of their liberty under article 2(3) and a restriction of their claim-right under article 26(1).

Where a treaty prohibits the right to legislate freely on a certain subject-matter, it introduces a disability with the equivalent loss of competence. A reservation to such a norm has the purpose of reintroducing the former competence wholly or partially. In a corresponding way, the other parties bound by the reservation will lose their immunity against decisions made by the reserving state on the subject-matter, and will be obliged to submit to such decisions. Egypt presented a reservation to article 49 of the 1963 Vienna Convention on Consular Relations, asserting its competence to decide on taxation of so-called consular employees and members of the service staff.⁵ Only with regard to consular officers was Egypt ready to accept its disability to tax. Correspondingly the immunities of the sending state were to be circumscribed.

The other kind of 'modifying reservations' could be imagined to alter the contents of a norm in a qualitative way. If instead of limiting the class of state of affairs regulated by the norm, a completely distinct state of affairs replaces the original one, we would have the case of a *qualitatively modifying reservation*. Instances of such reservations are hard to detect. As an example of such a 'modifying reservation' has been proposed the reservations adding to the Red Cross as the emblem of the medical services of the armed forces alternative signs, such as the Red Crescent, the Red Lion and Sun, and the Red Shield of David.⁶ Reservations concerning the emblem of the Red Crescent and the Red Lion and Sun were already introduced to the 1906 Convention for the Amelioration of the Condition of Wounded Soldiers.⁷ These reservations, especially the reservation by Persia, met with protests from the Federal Council of Switzerland in its function as depositary of the Convention. At the Hague Conference of 1907 the negotiating states were ready to accept Persia's demands for using its distinct emblem in maritime warfare. This forced the Federal Council to accept the emblem also with regard to warfare on land as governed by the 1906 Convention. Consistent with this, Turkey was also allowed to use the Red Crescent instead of the Red Cross.⁸ The 1949 Geneva Conventions now explicitly recognize the Red Crescent as well as the Red Lion and Sun as providing the same protection as the Red Cross.⁹ The 1949 Red Cross Conference was not ready to accept the amendment proposed by Israel to accept the Red Shield of David as enjoying the same status as the other three recognized emblems according to the provisions of the Conventions. Israel therefore entered a reservation to that effect when signing the Conventions.¹⁰ The intention of such a reservation is really to assure the liberty for the reserving state to choose an emblem other than those recognized by the Conventions. However it also creates a claim-right, as Israel's inten-

tion is to create a duty for the other parties to respect the inviolability of installations carrying the emblem of the Red Shield of David. Israel would thus not have the duty to use any of the recognized emblems in order to benefit from the protection stipulated by the Conventions. As far as the reservation would become effective the other parties would have the additional obligation not to violate the immunity of installations carrying the Red Shield of David beside the original obligation not to violate the installations carrying the emblems indicated by the Conventions themselves. It would seem the reservation enlarges the duties of the other contracting states. The reservations by Israel would thus in effect be of the 'quantitatively modifying' kind. On the other hand, it may be held that the amount of objects and installations profiting from the protection will not increase because a new emblem is introduced. However the participants in a larger war are forced to pursue an increased alertness because of the greater number of protective emblems, this may well be felt by the belligerent parties to increase their duties. The Israeli reservations could be referred to the so-called 'extensive reservations' because they intend to create wider obligations for the other parties. The problem of 'extensive reservations' will be treated later on.¹¹ For Israel the reservation would not have the effect of limiting its obligations. Irrespective of the reservation, Israel maintains the original obligation to respect any installation that carries one of the convention-based emblems.

Perhaps the Peruvian reservation to the ILO Convention on Unemployment (No. 2) constitutes a qualitative modification. Article 2 of the Convention requires the parties to establish a system of public employment agencies. Special committees, which shall include representatives of employers and employees, shall be appointed to assist and supervise these agencies in their work. Peru notified the International Labour Office that it did not intend to establish advisory committees but wanted to transfer the supervision of unemployment "to the authority of the State".¹² Peru abandoned its reservation after having received a letter from the Acting Director of the Labour Office explaining the restrictive practice of the ILO with respect to reservations.¹³

11.2 THE 'EXCLUDING' EFFECT OF RESERVATIONS

What does it mean that a reservation 'excludes' the legal effect of a provision? It must be stressed once again that the Vienna Convention is clear on the point that an 'excluding reservation' does not simply exclude a part of the treaty text. Expressions may be eliminated to avoid redundancy.¹⁴ Does then a reservation exclude the norm expressed by the textual provision? Such a reading would have the consequence that the subject-matter is considered as not formally regulated, at least not within the context of the treaty. The expression "excludes the legal effect of certain provisions" seems to lack the necessary precision. Does it signify that the state of affairs indicated by the provision shall be without any legal effects excluding if from binding regulation under the treaty? This can hardly be assumed to be the intention of a reservation. A normal reservation intends to limit the obligations for the

reserving state. Where a treaty-based norm creates an active duty to do a certain act, a state formulating an 'excluding reservation' wants to free itself from the duty. This reservation amounts to a denial of the duty to perform the relevant act and simultaneously an assertion that it will have the permission to abstain from doing the act. In accordance with the view propounded earlier a denial of an active duty or order will turn into a free choice permission or liberty. The reserving state will not only have the right to abstain from doing the act, but it will also be able to undertake the act if it so chooses. A reservation thus introduces a norm of the opposite kind. We may also say that an 'excluding reservation' has a *contra regulatory effect*. It cannot be assumed that the reserving state wants to exempt the act from binding regulation under the treaty system, leaving room for doubts as to its normative status. The relevant question is not referred to the extra-legal sphere. This argumentation presupposes that there always exists a body of acts, events and situations which is legally regulated, and a body of such phenomena which is not legally regulated. Within the realm of interstate relations there is a large number of phenomena which are not covered by international law. In the absence of regulation we are not allowed to say that a state has a legal liberty to act as it likes. It is submitted that there does not exist a fundamental rule in international law according to which everything that is not clearly prohibited under the international legal system is permitted. Where an act is permitted this must be inferred from the presence of particular rules. In the matter unregulated states will have a freedom *de fait*, but that is not the same as to say that there is a legal liberty confirmed by the legal system. At times when states extend their activities to new areas, as for example the Antarctica, the ocean floor or outer space, conflicts of interest will arise between states.¹⁵ These states will look for arguments justifying either an as extensive freedom of action as possible or arguments for limiting such freedom. These arguments will not have a legal character but only a political and moral character before agreement is reached on the bindingness of certain rules which will govern such new activities. Until such rules are introduced a state may not invoke a legal liberty to act and another state has not the duty to respect (or no-claim) that act.¹⁶

A reservation 'excluding' a duty in favour of a liberty may be found among those formulated to the 1962 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages. According to article 1(2) of this Convention, a party has the obligation to allow marriage by proxy or procuration where certain conditions are present. A number of states, among them the Nordic countries, have 'excluded' this norm by formulating reservations.¹⁷ They secure their legal liberty to permit or not to permit such marriages. Correspondingly other parties to the Convention have lost any possible claim-right against the reserving states to permit such marriages within their territories. Article 68(2) of the IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War states that the death penalty may be imposed on a protected person only in cases where the person is guilty of espionage, of serious acts of sabotage against the military installations of the occupying power, or of intentional offences which have caused the death of one or more persons, and provided that such offences were punishable by

death under the law in force in the territory before the occupation began. Certain Western states formulated reservations to this rule maintaining the right to impose the death penalty even where the local law does not provide for it.¹⁸ This right is a liberty and it is intended to bar the other parties from any right to claim a violation of the Convention if the death penalty is imposed contrary to the terms of article 68(2).

The 1961 Convention on Diplomatic Relations introduces a number of disabilities for the receiving state with respect to the diplomatic personnel of the sending state. Article 1(c) makes a distinction between the diplomatic staff, the administrative and technical staff, as well as the service staff of diplomatic missions. According to article 37(2) the administrative and technical staff shall enjoy the privileges and immunities assigned to diplomatic agents as specified in articles 29 to 35, except that immunity from civil and administrative jurisdiction does not extend to acts performed outside the course of their duties.¹⁹ This article was an example of progressive development of international law, because there could not be proved to exist a uniform state practice in the matter constituting international custom.²⁰ Various states such as Cambodia, Morocco and Portugal were not ready to assign such privileges and immunities to the administrative and technical personnel. The purpose of such a reservation was to deny any jurisdictional disability with regard to these categories of diplomatic personnel and establish full competence.²¹

In the case of stipulative definitions, as a particular kind of norms of qualification, 'excluding reservations' are possible and have been formulated.²² Stipulative definitions are usually assumed to have the same obligatory force as norms of conduct. The 1907 Hague Convention (V) on Neutral Powers and Persons in War on Land provides in its article 16 a definition of neutrals as nationals of a state which is not taking part in the war. Great Britain formulated a reservation to this article, 'excluding' it from application on her part. Thus, Great Britain retained her discretion to decide from case to case if she would consider a national of a state that is not taking part in the war as a neutral or not. She would for example have the liberty to mobilize nationals of neutral states for military operations. Such an 'excluding reservation' referring to a definition had the effect of freeing the British government from any restrictions of action with regard to nationals of a state not participating in the war. Great Britain's reservation was motivated by a concern for her colonies, where a greater portion of the local population were foreigners.²³ Considering that the entirety of obligations and rights within a treaty is based on some stipulative, legal definitions, reservations to them will sometimes be prohibited because of fear that such reservations would disintegrate the whole network of rights and obligations. So the 1951 Convention relating to the Status of Refugees prohibits in article 42 reservations to article 1 that provides the definition of the term 'refugee'.²⁴

Sometimes reservations, even though denying the obligatoriness of a certain act, still do not advocate complete liberty in the subject-matter. Such reservations may turn an obligation into a recommendation. A number of states, such as Angola, Austria, Ethiopia, Iran, Italy, Monaco, Sierra Leone, Spain, Uganda, Zambia and Zimbabwe presented reservations of such a nature to

the 1951 Refugees Convention.²⁵ Having declared that no legal obligations will flow from certain provisions of the Refugees Convention, they still accepted the relevant provisions as desirable standards which are worthwhile to realize. The reserving state would still have some moral obligation to strive towards guaranteeing the relevant rights under the Convention. Other parties to the convention or an international organization may have the right to inquire into the steps the reserving state has undertaken to safeguard these rights, although no legal claim-right can be invoked against the reserving state.

Treaty provisions themselves may have only a recommendatory character. Such provisions were frequent in the Hague Conventions on the laws of war. Though many of these provisions did not create any clear obligations for the parties, "reservations" were still made to them. As these statements designated by the declaring state as "reservations" did not have the effect of freeing the reserving state from any legal obligation, they would be construed as being simply declaratory. Article 1 of the 1899 and 1907 Hague Convention (I) on the Pacific Settlement on International Disputes states that, "... the contracting Powers agree to use their best efforts to insure the pacific settlement of international differences".²⁶ The Convention then continues to enumerate the various modes of settlement of disputes: good offices, mediation, recourse to international commissions were mainly expressed as recommendations and wishes, the "reservations" that were presented did not have any contraregulatory effect, but were only a way of emphasizing the non-obligatory character of the rules of the Convention. In order to construe such reservations as purposive they may have the aim of freeing the reserving state from any political obligation or possible secondary legal obligations.²⁷

These examples show that reservations are resorted to in order to exonerate the reserving state from the burden of treaty-based obligations. A duty is denied and a subjection is not accepted. Reservations may also be used to contradict a situation of no-claim and disability. If these various kinds of obligations are denied, it is done with the wish to broaden one's scope of rights. 'Excluding' a duty will lead to a liberty of action, 'excluding' an obligation of subjection will establish the immunity of the reserving state. The negation of a no-claim and of a disability is the same as to assert a claim-right or a competence. Thus, we may say that a reservation simultaneously with the limitation of the scope of obligations under the treaty, widens its scope of rights with regard to the reserving state. The 'excluding effect' of a reservation must be read as the exonerating effect of a reservation. It is not likely that the 'excluding effect' would signify the 'exclusion' of any right conferred on a party by the treaty. If the assumption that a state desires to maintain all the rights it enjoys by the treaty, be they claim-rights, competences, liberties or immunities, is reasonable, it has to be kept in mind when considering the case of the so-called extensive reservations. As reservations are not supposed to refer the relevant subject-matter to the extra-legal sphere the restriction of the scope of legal obligations will simultaneously widen the scope of rights for the reserving state.

As mentioned above the distinction between first-order and second-order norms and legal relations is mainly of a clarifying nature. Secondary norms

of qualification comprising norms of competence may be reduced to primary norms of conduct. So for example the disability to tax certain categories of diplomatic or consular personnel may be translated into a duty not to tax them.

11.3 THE CASE OF THE COMMISSIVE RESERVATIONS

In the preparatory work of the Vienna Convention and in international legal doctrine we encounter views which admit the possibility of so-called 'negative reservations' or 'extensive reservations'.²⁸ Through such statements which could more properly be called *commissive* the declaring state would commit itself to obligations not required by the treaty or to obligations that go beyond that which the treaty stipulates. The first rapporteur on the law of treaties in the ILC, Brierly, did mention the possibility that reservations "... enlarge rather than restrict the obligations ..." of the declaring state.²⁹ As an example of such a commissive reservation he mentioned the statement made by South Africa to article XXXV of the General Agreement of Tariffs and Trade (GATT) when becoming a party to the Protocol of 24 March 1948 modifying certain provisions of the General Agreement. According to this article the Agreement shall not apply between parties which have not entered into tariff negotiations and which do not consent to its application. The contracting parties declared at their third session on 9 May 1949, that South Africa due to this "reservation" had committed herself to apply the General Agreement with regard to all contracting parties irrespective of whether negotiations had taken place between the parties or not.³⁰ Another example is provided by the statements of Mexico and the United States, whereby they declared their intention to impose stricter measures than those required by the 1931 Geneva Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs.³¹

The question arises if it is justified to consider these statements as being statements that commit, i.e., oblige the declaring state to more than is asked for by the treaty? Or are they simply declarations of intentions? A closer look at the circumstances that surround these statements and their actual formulation is necessary in order to find an answer.

In the GATT case the relevant article XXXV provides for a possibility to derogate from the obligations of the General Agreement. The insertion of this article into the General Agreement was initiated by India in order to permit the Indian government not to enter into any legal relations under the General Agreement with South Africa, whose policy of apartheid it could not accept.³² South Africa's statement was a protest against the insertion of article XXXV into the General Agreement. The value of this statement is difficult to determine as it refers to a provision that makes it possible for a party to free itself from the obligations of the General Agreement under certain conditions. The provision introduces a right of option with respect to some particular party. The natural reading of the South African statement would be to consider it a denial of the liberty to abstain from implementing the required acts of the General Agreement. The sum of the obligations cre-

ated under the GATT would be $0(p^1 + p^2 + \dots p^n)$, consisting of orders and prohibitions. Article XXXV permits a deviation from the sum of obligations which is to say that $\neg 0(p^1 + p^2 + \dots p^n)$ if nn , the condition that no negotiations have been held. The expression "... and not consent to its application" is simply underlining the optional character of the provision. If nn is the case, i.e., no tariff negotiations have been held, then there will be a liberty for the party invoking article XXXV to undertake the acts as originally required by the Agreement: $P(p^1 + p^2 + \dots p^n)$. The statement now contends that there ought not to be a liberty to apply or not to apply the rules of the GATT where no tariff negotiations have been held: $\neg P(p^1 + p^2 + \dots p^n)$ if nn . Thus, $0(p^1 + p^2 + \dots p^n)$ ought to be the case and there is an obligation according to South Africa to apply the rules of the Agreement irrespectively of whether or not there have been undertaken tariff negotiations. South Africa was presumed not to accept any derogation to the norms of GATT. It was politically unthinkable that the unilateral statement by South Africa was not to be given the effect of depriving the other parties of the treaty-based liberty to derogate from the obligations of GATT. The meeting of the contracting states never considered the possibility that the statement would diminish the rights and enlarge the obligations of the other contracting states. Their view, as presented at their third session seemed to be that South Africa committed herself to apply the General Agreement without exceptions on her own part with regard to all the other parties irrespectively from any invocation of the exception under article XXXV, whereas the other parties were not supposed to loose their liberty to invoke the benefits of this article. It seemed that South Africa through its protest had lost the benefit to invoke article XXXV. The effect of the view expressed at the third session had the result of putting South Africa in a worse position than if she had remained silent. The problem in this case was that the contracting parties construed the statement as a commissive reservation and accepted it as such. It was not understood and therefore not accepted as a reservation circumventing the liberty of the other parties widening their duties as would be the normal reading of the statement. It has to be clearly ascertained that the declaring state intended to be bound unilaterally with regard to the other parties without the right to make use of the exemption under article XXXV. The rules on reservations will hardly be applicable to the construction of commissive reservations. For example the principle of reciprocity will not be applicable. If the South African statement would have been established as a proper reservation excluding the right of exemption under the article and the contracting parties would have objected, which was not done, article XXXV would according to the reservation regime under the Vienna Convention become inapplicable between South Africa and the other parties. The question of the non-application of the Agreement according to the terms of article XXXV would turn out to be unregulated. Confronted states may try to make use of the liberty of non-application and South Africa may deny such liberty, but the dispute could not be settled according to the rules in the Agreement itself. The only reasonable understanding of the effects of the South African statement would be that the other contracting states preserved their liberty under article XXXV and that South Africa by its statement did not ensue any

duty to apply the entire agreement vis-à-vis states that were not applying the agreement with regard to her, but she had the liberty so to do. Thus, the statement has no legal significance as it makes no difference between the situation where the declaration had been made and where it would not have been made. It seems unrealistic to presume that South Africa would apply the obligations under the General Agreement with regard to a party invoking the option under article XXXV of not doing it. Although the intention with the statement had been to retain the original scope of obligations by excluding the exceptions of article XXXV for all the parties, the session of the contracting parties seemed to have turned it into a weapon against the actual declaring state, maintaining an unrestricted scope of obligations for South Africa, while safeguarding the right of option for the other parties.³³

The case of the Mexican and the United States "reservations" to the 1931 Narcotics Convention is less complex. These statements did not actually purport to impose on the declaring states any obligations that would go beyond the obligations of the Convention.³⁴ According to their formulation the declaring states "reserved their right" to impose measures stricter than those required by the Convention itself. This would suggest that the declaring states had no intention of assuming more extensive duties. Instead they postulate the liberty to undertake more stringent measures than intended by the Convention.³⁵ However, these declarations seem to have no practical effect as they only state what would anyway be the case. Even without such declarations the parties would be at liberty to limit the manufacture or distribution of narcotic drugs in the sphere that remains outside the realm of articulated obligations. These declarations may be looked at as an expression of a laudable intention not resulting in any corresponding claim-right by the other parties. It could be argued that the far-reaching measures as indicated by these declarations may affect obligations under other treaties, guaranteeing free-trade and abolishing import restrictions for, *inter alia*, medical products and that the statements were intended to meet any possible protest against the discriminatory effects of such measures. On the other hand, such unilateral declarations will not be able to modify obligations under other treaties.

The two above-mentioned examples of commissive reservations do not in fact qualify for true commissive reservations. None of these statements really alters the norms of the two treaties to which they have been presented. The first of these "reservations" was apparently not in favour of a treaty-based liberty. However, the contracting states of the GATT did proclaim that the effect of the South African statement was not to debar the other parties from the option but only South Africa herself. This understanding would be contrary to the very intention of the statement. It must be noted that the opinion presented by the chairman of the second session of the contracting parties and adopted at the third session was not formulated in categorical terms: "... while South Africa *would continue ... and would presumably apply* the General Agreement to all contracting parties, irrespective of whether or not tariff negotiations have taken place between the parties."³⁶ (emphasis added). There is hardly any reason to believe that South Africa has committed herself unilaterally to an obligation. She has though the liberty to apply the agreement to those parties not applying it vis-à-vis herself. However, this

liberty will be present irrespective of any statement having been made by South Africa. The statement of the United States and Mexico do not constitute a reservation committing them to wider obligations than required by the Narcotics Convention, but simply a declaration of intention that they want to make use of their liberty in a certain direction. The other parties to the Convention which have received information about the declarations will not acquire a claim-right to demand that the declaring states should undertake these far-reaching measures. None of these statements alter the norm system instituted by these Conventions and are therefore not to be considered as reservations.

11.4 EXTENSIVE RESERVATIONS PROPER

Although it is highly unlikely that any state will declare its willingness to accept unilaterally obligations beyond the terms of the treaty, it may well be possible that a state will strive to impose wider obligations on the other parties assuming correspondingly wider rights for itself. Such statements are not commissive; they do not commit the declaring state because they do not impose new obligations on that state itself but on the other parties. The legal effect is the same even if they would be simply formulated as to safeguard wider rights for the declaring state.³⁷

On signing the 1935 Convention Concerning the Transit of Animals, Meat and Other Products of Animal Origin, Czechoslovakia declared that it did not accept the free transit of animals across its territory but reserved the right to require prior authorization. This means that the other contracting parties would have a duty to apply for such an authorization contrary to the stipulations under article 9 of the Convention.³⁸

CHAPTER 12

THE IMPACT OF RESERVATIONS ON THE CORRELATIVITY OF TREATY RELATIONS

The drafters of the Vienna Convention provisions on reservations have assumed that rights and obligations operate mutually between the parties when formulating the rules on reservations. Article 2 of the Vienna Convention containing the definition of reservation stipulates that a reservation is intended to 'exclude' or to 'modify' the legal effect of certain provisions in their application to the reserving state. A reservation seems at the first glance to have a self-relating quality. Through a reservation a state intends to modify its legal status under the treaty. However, article 21 of the Vienna Convention indicates that the legal effects of a reservation may be looked upon from two sides. The view that treaty-based relations are correlate relationships between states seems embraced by the wording of article 21(1)(a) stipulating the legal effect of reservations in the following way:

"A reservation . . . modifies for the reserving State *in its relations with that other party* [i.e., the accepting state] the provisions of the treaty to which the reservation relates to the extent of the reservation;" (emphasis added)

If a reserving state 'modifies' or 'excludes' a *positive obligation* of duty or of subjection, this would automatically 'modify' or 'exclude' the other parties correlate right to claim, or their correlate right to assert a competence. A strengthening of the legal status of the reserving state results in the corresponding weakening of the legal status of the confronted states.¹

An example of an 'exclusion' of a positive obligation may be drawn from the 1952 International Convention to Facilitate the Importation of Commercial Samples and Advertising Material. Article V creates a duty for a party to exempt advertising films from import duties when temporarily admitted into its territory. Tanzania presented a reservation denying this duty reserving her liberty "... not to grant to advertising films temporary duty-free admission treatment".² The other contracting states will lose their claim-right under article V with respect to Tanzania. Article 6(1) of the 1965 Convention on Transit Trade of Land-Locked States stipulates a duty for the transit states to grant to goods in transit "... conditions of storage at least as favourable as those granted to goods coming from or going to their own countries." The FRG was not willing to assume the obligation under article 6(1).³ The correlate claim-right of the other parties was automatically denied. These two reservations 'exclude' a positive obligation of duty for the reserving state and a positive right of claim for the confronted states and introduce simultaneously a negative right of liberty for the reserving state and a negative obligation of no-claim for the confronted states.

In the case of *negative obligations*, no-claims and disability, a reservation

'excluding' or 'restricting' such an obligation will signify the introduction of a new or enlarged claim-right or competence for the reserving state.⁴ Correspondingly, the other parties would experience an encroachment on their correlate liberty or correlate immunity resulting in a new or enlarged duty or obligation of subjection. It follows from article 14 of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone that all ships irrespective of their character shall enjoy the right of innocent passage through the territorial sea of another state. A ship in innocent passage is supposed to comply with the laws and regulations of the coastal state, in particular those that relate to transport and navigation (art. 17 of the Convention). A warship in innocent passage which does not comply with such regulations can according to article 23 be required by the coastal state to leave its territorial sea. A certain number of reservations (8) were formulated to articles 14 and 23 making the innocent passage of warships conditional on an express authorization by the coastal state.⁵

Such reservations had the purpose of remedying the disability of the coastal state by introducing a competence to authorize, prohibit or permit the innocent passage of warships. It could also be argued that the reserving state did not accept its no-claim under the Convention with respect to the innocent passage of foreign warships, establishing instead a claim-right to comply with the prohibition it had decided upon. Correspondingly, the immunity of the other parties against such prohibitive proclamations is turned into an obligation of subjection. The purpose of the reservation is to make the other parties recognize the competence of the coastal state to prohibit the innocent passage of warships. Or to put it another way, the original liberty of the other parties is turned into a duty to comply with the possible prohibitions issued by the reserving state.

Looking through the conceptual framework of correlativity we have to admit that the immediate effect of reservations is to be advantageous for the reserving state and correspondingly disadvantageous for the confronted states. It does not matter if the reservation has been expressed in obligations-diminishing or rights-enlargening terms. Reservations will in the standard case circumscribe the correlate rights of the other parties and widen their correlate obligations.⁶ The distinct rule of the reciprocal invocation of the benefits of a reservation is intended to reintroduce a balance into the legal relations between the reserving and the confronted states. To what extent this is possible will be discussed later on.⁷

The following scheme shows the mutual operation of reservations when they have been formulated to restrict the positive obligations (duties and subjections) of the reserving state.

SPHERES OF LEGALLY REGULATED ACTIONS

	NORMS OF CONDUCT		NORMS OF COMPETENCE	
reserving state	duty	liberty	subjection	immunity
confronted state	claim-right	no-claim	competence	disability

Reservations operate in the direction of the arrow. A reservation limiting the scope of positive treaty obligations for the reserving state at the same time enlarges the scope of its negative treaty rights (liberties and immunities). Correspondingly, it limits the scope of positive treaty rights (claim-rights and competences) for the confronted states widening the scope of their negative treaty obligations (no-claims and disabilities). We may call reservations that work this way *self-discharging* as they free the reserving state from certain positive obligations. For the reserving state a positive obligation is eased in favour of a negative right. For a confronted state this means that a positive right is thwarted in favour of a negative obligation.⁸

In addition to the category of self-discharging reservations, we assume there to be reservations that impose positive obligations on the confronted states by asserting wider positive treaty rights for the reserver, either more extensive claim-rights or broader competences. Such reservations may be termed *other-imposing*. Other-imposing reservations would broaden the scope of positive rights for the reserving state, narrowing at the same time the scope of its negative obligations. For the confronted state this would mean that its corresponding scope of negative rights is curbed, leading to an increase in the scope of its positive obligations.⁹

The effects of other-imposing reservations would be clarified by the following scheme:

SPHERES OF LEGALLY REGULATED ACTIONS

	NORMS OF CONDUCT		NORMS OF COMPETENCE	
reserving state	claim-right	no-claim	competence	disability
confronted state	duty	liberty	subjection	immunity

As mentioned earlier in connection with the so-called commissive reservations, we do not assume the existence of reservations of a *self-imposing* kind, resulting in wider duties (or subjection) for the reserving state, or *other-discharging* reservations that have the effect of limiting the rights of the reserver and the correlate obligations of the confronted states.

The opinion is often expressed that reservations only diminish the obligations of the reserving state, but that they never enlarge the obligations of the confronted states.¹⁰ The wording of the definition of reservations does not justify such a contention. When article 2 of the Vienna Convention stipulates that a reservation 'excludes' or 'modifies' the legal effect of a treaty provision it may signify any alteration of the legal norm expressed by the provision.¹¹ Looking at norms as correlate and opposite concepts of rights and obligations, makes us out of necessity recognize that any restriction of the scope of obligations for the reserving state results automatically in a corresponding widening of the obligations for the confronted states.¹²

What then about the view that it is conceptually impossible for reservations to impose obligations on the confronted states? It certainly cannot be read to mean that all kinds of obligation-increasing reservations fall outside the

Vienna Convention concept of reservation. This would have the unacceptable effect of eliminating most categories of reservations.¹³ A reasonable interpretation of this view would be to exclude such statements from the concept of reservation that would introduce positive obligations, duties and subjections, for the confronted states. Usually such statements are not formulated so as to impose positive obligations on the other parties, but call for wider claim-rights or a larger competence for the reserving state, in both cases the effects will be the same.

The view that reservations cannot increase the obligations of the confronted states has not been based on any thoroughly motivated reasons. It is simply animated by a vague feeling that reservations which weaken the position of the confronted states cannot be admitted but only those strengthening the position of the reserver. Given our understanding of this view, it would have to be construed as meaning that reservations which create obligations of the positive kind do encroach on the legal position of the confronted states in a more profound way, than do reservations which give rise to negative obligations for those states. It remains to be seen if this argument is tenable. The 1982 Convention on the Law of the Sea introduces the notion of exclusive economic zone. The rules concerning this zone limit the traditional freedoms (liberties) of the high seas, by creating a number of duties for the non-adjacent states, for example, the duty not to explore and not to exploit the natural resources of the economic zone.¹⁴ A state 'excluding' the provisions relating to the economic zone by presenting a reservation would deny all these duties and reassert the former liberty. This would result in the denial of the positive right for adjacent states to make use of a claim-right where any of the duties mentioned in the 1982 Convention have been set aside. Even though it only aims at asserting a negative obligation of no-claim for the confronted states it considerably endangers the interests of these states. Such a reservation would actually fall under the prohibition under article 302 of the Convention. We see that not even reservations which would introduce "only" negative obligations can be deemed always admissible.

The distinction between severe reservations introducing positive obligations and trivial reservations introducing negative obligations does not satisfy as an argument.

On the other hand, it is easy to find examples of reservations which do impose positive obligations on the confronted states. Article 27(3) of the 1961 Diplomatic Relations Convention guarantees the inviolability of the diplomatic pouch. The sending state has the liberty to decide whether or not it wants to let the receiving state open its diplomatic bag. The receiving state has a no-claim.¹⁵ Now a number of states have made statements to this article denying the immunity of the diplomatic bag, asserting a competence and a claim-right to have it opened on request. The effect of the reservation would be a subjection and a duty for the confronted states to let the receiving state go through the diplomatic bag. There has never been expressed any doubt that these statements which actually purported to introduce positive obligations for the confronted states would not have been proper reservations.¹⁶

Another statement which could be held to have the effect of introducing duties for the confronted states, was the one presented by Iran on signature to

articles 2(3) and 26(1) which establish the liberty to lay cables and pipelines on the bed of the high seas, and the corresponding no-claim for the coastal state concerning the prohibition of such activity. The Iranian statement intended to eliminate this liberty by asserting a claim-right for Iran to require that cable-laying states would always have to apply for a special authorization (permission) before undertaking the laying of cables on the Iranian continental shelf. The confronted states would have a positive obligation not to lay cables without prior Iranian authorization. Even in this case there was no question of the statement not being a true reservation. The six states that reacted against this statement referred to it as a reservation.¹⁷ They presented formal objections to the statement in order to avoid the possibility of their silence being construed as tacit acceptance of the reservation. Their objections appear to have been unnecessary as Iran has not ratified the Convention.

Self-discharging and other-imposing reservations cannot be distinguished from each other as regards the number of inconveniences they bring about for the confronted states. In the instant cases it may also be difficult to determine whether a reservation is self-discharging or other-imposing. Article 9 of the High Seas Convention exempts only government-owned ships which are used for non-commercial purposes from the possible jurisdiction of other state parties. Twelve states presented reservations extending the immunity of government non-commercial ships also to commercial ones. These reservations would amplify the disability of the confronted states with respect to foreign government ships.¹⁸ They assert at the same time a wider competence or jurisdiction for the reserving states with regard to their own government ships. These other confronted states will have both the positive obligation (subjection) to recognize the competence of the flag state with regard to all categories of government-owned ships and the negative obligation (disability) to refrain from applying their own jurisdiction to such ships. The reservations to article 9 provide examples of competing competences (where reservations have the double effect of introducing both broader positive and negative obligations for the other states).

Not even distinctions between active duties or orders and passive duties or prohibitions, both being positive obligations, may provide a reliable basis for distinguishing between those statements that fall under the concept of reservation and thus governed by the rules on reservations, and those statements that as declarations short of reservation are not governed by these rules. The statement denying the freedom of innocent passage of warships introduces an active duty to ask for the authorization of the coastal state before passing through the territorial waters of that state. That this statement is a proper reservation has hardly been questioned, and even those authors who have found it difficult to conceive that reservations may create obligations for the confronted states have classified it as a reservation.¹⁹

The contention that statements which intend to introduce obligations for the confronted states could not be considered as reservations is motivated by the dislike of accepting that such other-imposing statements would become binding on the confronted states that did not formally object to them, in accordance with, the rules on tacit acceptance. This argument taken as such is untenable. As shown, it seems impossible to sort out statements which create

obligations for the confronted states from those being 'true reservations'. Firstly, all reservations do somehow create obligations for the confronted states.²⁰ Secondly, the distinction between positive and negative obligations does not seem to bring us any further. Reservation practice does not provide any evidence that states have made such a distinction. Nor do the propagators of this limitation to the reservation concept invoke this distinction to justify their reasoning. Thirdly, the possible distinction between active and passive duties is plagued by the same defects as the distinction between positive and negative obligations. Fourthly, we have the complex case of reservations that bear upon competing competences and which therefore have the double effect of bringing about both negative and positive obligations for the confronted states.

Writers not accepting 'extensive reservations' have presented examples of statements which impose obligations on confronted states and therefore could not be recognized as reservations proper governed by the reservation regime of the Vienna Convention. The example of statements relating to so-called clauses of colonial application is an unhappy one.²¹ Colonial clauses, as we will see later, were the result of fundamental doubts as to the application of treaties by the metropolitan government to dependent territories. These clauses were to settle the question, by leaving it to the option of the metropolitan state to apply or not to apply the treaty norms to the dependent territories. Statements made to such clauses cannot be construed as intending to assert the opposite of a liberty, a duty to apply (or not to apply) a treaty to the dependent territories. A negation of the liberty does not as such clearly indicate if there should be a duty to apply or a duty to abstain from applying the treaty to the non-self-governing territories. This follows from the fact that permission is usually conceived as a free choice permission.²²

Pilloud does not count the Israeli statements to the 1949 Geneva Conventions on the humanitarian law of war (I, II and IV), relating to the use of the Red Shield of David as a protecting emblem, as a true reservation, because it increases the obligations of the other states party to the Conventions.²³ This argument does not suffice to proclaim the statement to be a simple "unilateral declaration". In principle the rule on tacit acceptance discussed later on would be applicable to such an 'extensive reservation' as to other reservations. Such tacit acceptance can, on the other hand, not be presumed, because of the constant opposition of the parties to the Geneva Conventions to confer on the Red Shield of David the same legal status as have the other official emblems. In practice the Red Shield of David has been respected, and this by states not recognizing Israel, but this is not because there is any legal obligation to this effect but merely out of considerations of convenience.

A criterion that would help us sort out obligation-increasing reservations that could not well be classified as reservations, is that their aim is to increase the obligations of all the participating states in their mutual relations, that is, also between parties not having entered any reservation. Reservations have according to the Vienna Convention definition a limited operation, only affecting relations between the reserving state and each other individual state having accepted the reservation. If a statement would modify all relations under the treaty, it amounts to a unilaterally initiated amendment. It would

have to be dealt with according to the formalities that govern the amendment procedure in order to become effective. The Iranian reservation mentioned above concerning the laying of cables and pipelines on the continental shelf was formulated in general terms. In spite of this it was not conceived as intending to modify all relations under the Convention, but only the relations between Iran and the other parties.

CHAPTER 13

FORMAL STATEMENTS NOT AMOUNTING TO RESERVATIONS: PROBLEMS OF BORDERLINE CASES

One of the great hazards of treaty practice is the rich variety of formal statements presented at the moment of giving consent to be bound by a treaty. There are no clear and undisputed criteria that would allow for a clear-cut classification of various statements into those that constitute proper reservations and those that constitute other categories of declarations. Efforts to classify formal statements which are presented at the same time as reservations may suffer from a certain degree of arbitrariness. It is well possible that a statement may be referred to two or more categories of declarations. What is crucial for our study is that these statements resemble reservations in many ways, but that a distinction has to be made because declarations short of reservation are not governed by the reservation regime. Formal statements may be classified according to how they affect the implementation of the treaty norms.¹ They may bear upon the temporal or the territorial application of the treaty provisions. They may relate the treaty to questions of domestic policy or to principles of international policy.

13.1 DECLARATIONS CONCERNING TEMPORAL IMPLEMENTATION

Formal statements that concern the implementation *rationae temporis* of a treaty intend to postpone the entry into force of all or part of the treaty norms. Their entry into force with regard to the declaring state depends on the occurrence of certain specified acts in the future. As long as these suspending conditions are not fulfilled, the treaty or parts of it do not apply to the declaring state. As a rule such statements are not mistaken for reservations.

13.1.1 Suspending conditions whose fulfilment does not depend on the declaring state

A state may declare that the entry into force of a treaty as regards itself will depend on a condition that has to be fulfilled by the other negotiating states. The United States ratified the 1925 Geneva Convention on the Supervision of International Trade in Arms and Ammunition subject to the condition that the Convention should not come into force for the United States until it had become effective as to certain states mentioned in the declaration.² In this specific case the act of ratification itself remained in suspension. The French government acting as depositary was of the view that the US instrument of ratification could not be counted as one of the fourteen ratifications necessary to put the Convention into force.³

Statements of such a nature postpone the entry into force of the entire treaty with regard to the declaring state. As these statements have the effect of only postponing the participation of the declaring state to a later date, they did not result in a derogation from the norm system established by the treaty. They are unequivocally not to be identified with reservations.

13.1.2 Suspending conditions whose fulfilment depends on the declaring state

Formerly as there was still a wide disagreement on which domestic organs were to share the treaty-making power, representatives of countries having a parliamentary constitution often signed treaties subject to a "reservation of ratification".⁴ These formal statements were simply declaring that the treaty should not become binding on the declaring state before the legislative had given its final consent to the treaty.⁵ Such declarations were a response to the negative attitude towards any participation of a popularly elected diet in the treaty-making procedure among states still adhering to the principle of the unrestrained prerogative of the executive in foreign affairs.⁶ They had the function of warding off any claims as to the bindingness of the treaty before the popularly elected organ had given its approval. 'Reservations of ratification' are not constituting reservations proper but are suspending declarations. Whereas other parties would consider the treaty as effective from the moment of signature, the declaring state did suspend the entry into force of the treaty for its part until the moment the consent of the legislative body had been given and transmitted to the depositary or the other parties. The treaty-making competence of the legislative no longer being under dispute these 'reservations of ratification' have lost their significance. The question of the entry into force and the need for ratification is nowadays normally settled in the final clauses of a treaty.

Formal statements closely related to the above-mentioned declarations, are those which while stating a willingness to adhere to the treaty inform that the treaty is not to enter into force for the declaring state before national legislation has been brought into conformity with the legal commitments of the treaty. Switzerland made such a suspending declaration on acceding to the 1931 Conventions on the Conflict of Laws in Connection with Cheques respectively Bills of Exchange and Promissory Notes. The two ratifications of Switzerland were deposited on 26 August 1932, but the two conventions were not to enter into force for Switzerland until 1 July 1937, the date on which the Swiss law revising sections XXIV and XXXIII of the Swiss Federal Code of Obligations entered into force.⁷

The above-mentioned cases are clear and unambiguous. Suspending declarations of this kind are not to be considered as reservations. On the other hand, declarations may suspend parts of the treaty from becoming effective for the declaring state. A state may declare on ratifying or acceding that the treaty is going to take effect with the exception of certain provisions which will enter into force with regard to itself only after certain amendments have been introduced into its national legislation. If such a statement really has the effect of altering the norms expressed by the treaty it acquires the character of a reservation. The treaty is going to be applied between the declaring state and the

other states (if no objections) in a restricted way from the date of its entry into force. The declaration promises that the restricted operation of the treaty will be temporary and last only as long as the necessary amendments to the domestic legislation have not been carried out. These legislative measures may of course require a long time. The executive of the declaring state may also fail to get the necessary amendments approved by the diet or might change its mind as to the necessity of introducing these amendments. What originally was intended to be a statement of partial suspension turns out to be a permanent reservation. On the other hand, we have reservations that are formulated because national legislation does not conform to the treaty and whose operation is not limited as to a specific period. They may later lose their effectiveness when the relevant statutes have been amended irrespective of whether they are formally withdrawn or not. The last distinction between a suspending statement and a normal reservation disappears.

The United States stated on ratification of the 1933 Montevideo Convention on Extradition in 1934 that articles 2, 3(d), 12, 15 and 18 shall not be binding on the US "... until subsequently ratified in accordance with the Constitution of the United States of America".⁸ The General Secretariat of the Organization of American States as depositary of the Convention has not until now received any communication from the US government that the Senate has given its consent to the implementation of the afore-mentioned articles.

Contracting parties whose domestic laws do not conform to the terms of a treaty, but which positively intend to amend their legislation in order to remedy the relevant contradictions, will have the choice of presenting temporary reservations or wait with the ratification until their legislation has been duly amended.⁹

As mentioned earlier there had been proposed within the OAS a system making it possible to formulate 'reservations of theoretical adherence', which would have the effect of suspending those parts of a treaty that did not conform with national legislation. The idea was abandoned because such reservations would not indicate those parts of the treaty that would be suspended thereby creating an unacceptable uncertainty.¹⁰

13.2 DECLARATIONS OF TERRITORIAL APPLICATION

A treaty which has entered into force will apply to the entire territory of a party. This is a general principle which must be regarded as a norm of customary international law. It has been codified in article 29 of the Vienna Convention. However, the rule that a treaty will be binding on a party with respect to its entire territory is facultative. The treaty itself may stipulate that it will apply only to a specified part of one or more of the parties. Such limitations in the territorial application of a treaty may also be permitted in an annexed agreement between all the parties.¹¹ What is of interest to us in this connection is that a party unilaterally declares that the treaty will not take effect in certain parts of its territory.¹²

The question whether a statement bearing upon the implementation *ratione loci* of a treaty by excluding certain territories from the application of the treaty

constitutes a reservation, cannot be answered without analyzing the object of the treaty and the effect of such a territorial statement upon its operation. Does the statement really change the legal effect of the treaty by bringing about an alteration in the treaty obligations and the corresponding rights? Do the confronted states have to face any encroachment on their legal position due to the territorial statement?

If the question of territorial application is part of the functioning *ratione materiae* of the treaty, that is the very subject-matter of a treaty, a statement that would modify this operation would in fact be a reservation. Treaties whose object is to regulate territorial matters are treaties establishing a special legal regime in a clearly delimited area. Such treaties may provide for the demilitarization of a specified area, the establishing of conservation zones for the living resources of the sea, the prohibition against dumping of hazardous waste in certain parts of the high seas, etc. It may occur that a state abstains from recognizing the neutralized status of certain parts of the demilitarized zone, or exclude certain parts of a conservation zone from the obligation to undertake measures of protection, or certain parts of the closed zones from the obligation not to dump wastes. Here territorial operation belongs to the very content of the treaty norms and any alterations with regard to this operation modifies the norms and fulfils the essential criterion of reservations.

A treaty whose material provisions are not directly of a 'territorial' nature may stipulate that it is mandatory that the material treaty norms should be effective in the entire territory of the contracting states. Here the unrestricted implementation of the material norms within the entire territory of the parties is established as a necessary condition for participation in the treaty. This condition can be said to enter into each of the single material norms and where a state tries to modify this condition it will also be considered as a reservation. Collective defence treaties may create an obligation to assist any party attacked within a certain specified area, the "treaty area" (article 6 of the North Atlantic Treaty and article 8 of the Pacific Charter and Southeast Asia Collective Defense Treaty). When a contracting state declares that it will not accept such a duty to assist where the attack occurs within a certain defined area within the treaty area it amounts to a reservation. Defence treaties form a specific category of treaties where reservations will not be governed by the normal regime on reservation. (See Vienna Convention article 20(2).)¹³

In those cases where the treaty remains silent with regard to the territorial implementation of the treaty norms which are not of primarily territorial concern, statements that restrict the territorial operation will presumably not mitigate the obligations under the treaty and therefore not amount to reservations. Article 16(4) of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone guarantees the right of passage through international straits. The coastal state may declare its right to determine the navigational routes through the strait without this automatically constituting a reservation jeopardizing the right of transit through the strait.¹⁴ The new 1982 Convention on the Law of the Sea expressly permits the coastal state to designate so-called sea lanes.¹⁵

A category of frequently appearing declarations which are related to the above-mentioned territorial declarations concern areas having a special auto-

nomous status. As the competence of the central government to legislate for this area is circumscribed by the constitution and international agreements, it may not bind that area to the treaty, without having received the consent of the competent body of the autonomous region. Denmark frequently had to make statements excluding the application of a treaty to the Faeroe Islands and Greenland, and the United Kingdom similar statements with regard to the Channel Islands and the Isle of Man.¹⁶ Often such territorial limitations will be brought to the knowledge of the other negotiating states during the negotiations. Such limitations may have become so well-known that they will hardly come as any surprise to the other states. Declarations of such territorial application are necessitated by the constitutional limitations of the treaty-making power of the declaring state. As it lies beyond the competence of the traditional treaty-making organs of the state to bind such autonomous areas and these statements have only the function of making the other contracting states aware of such restrictions, they cannot be considered as reservations.¹⁷

Another category of territorial declarations which have formerly been quite common are the so-called colonial declarations. Through these declarations the metropolitan government notifies the other parties to what extent the treaty is to apply or not to apply to the dependant territories for whose external relations it is internationally responsible. Such declarations seemed necessary as there was no general rule on the application of treaties to non-self-governing territories. Opinions as to the colonial application of treaties have been quite divergent. Fitzmaurice and McNair have opined that in cases where the treaty is silent on the question, it would also apply to the colonies.¹⁸ Continental writers such as Huber and Khadjenouri spoke against the presumption of application to colonies.¹⁹ Khadjenouri states that the representative of the metropolitan government has two "powers", one to sign the treaty for the metropolitan area and the other to sign it for the colony.²⁰ Therefore the statement that a signature or ratification was not to extend to dependent territories could not be a reservation but only a notification of using one of two or more authorizations.²¹ Also British writers admitted that the dominions were constituting a problem apart. Owing to constitutional rules the British government was not able to bind her dominions on the international level. The autonomy of the dominions provided them with the competence to decide whether to consent or not to a treaty entered into by the metropolitan government.²²

Neither the International Law Commission nor the Vienna Conference on the Law of Treaties could bring any clarity into the question of colonial application.²³ Article 29 of the Vienna Convention on the territorial application of treaties avoids the problem.²⁴ As the matter remains unsettled and no rule has become crystallized, a declaration of colonial application cannot be construed as derogating from the 'normal' scope of application and would thus not be qualified as a reservation.²⁵ Also, the same arguments that were presented in connection with the other territorial declarations may be invoked in connection with colonial declarations. This holds true with respect to treaties which do not contain rules on colonial application or so-called colonial clauses.²⁶

A number of treaties do settle the question of the colonial application of the treaty to dependent territories in their final clauses. These colonial clauses permit the metropolitan government to notify if it is going to include the depen-

dent territories under the operation of the treaty. We find such a clause for example in article 13 of the 1961 Hague Convention Abolishing the Requirement of Legalization of Foreign Public Documents, also in article 25 of the European Convention on Mutual Assistance in Criminal Matters, and the familiar article XII of the 1948 Genocide Convention. The colonial clause may also permit the exclusion of territories for which a contracting state is internationally responsible from the application of the treaty. Such a possibility is found in article 13 of the 1950 Convention on the Declaration of Death of Missing Persons. Or the colonial clause may not admit any option but require the automatic application of the treaty to the dependent territories as is the case in article 9 of the 1959 Convention on International Right of Correction.²⁷

Newly independent states as well as socialist states have not been eager to accept colonial clauses, especially not those providing an option for the metropolitan government.²⁸ Their opposition, which has been a matter of principle, motivated by their unwillingness to accept the competence of metropolitan governments to apply or not to apply treaties to dependent territories, has not been consistent. A denial of an option, i.e., a liberty, is the same as asserting either a duty to do the specified act or a duty not to do it. It is not evident which one of these two alternatives will hold for formal opposition to optional colonial clauses. Elias stated that even though there is a basic opposition to the application of treaties to non-self-governing areas, allowance is made for the application of treaties concluded by metropolitan governments for humanitarian and social purposes.²⁹ Opposition to colonial clauses is very much a matter of principle. Formal protests to colonial clauses do not as a rule indicate the effects they are going to have on the treaty operation.³⁰

The question whether dependent territories may be bound or not by a treaty according to the option of a metropolitan government is actually concerning much more the implementation of the treaty *ratione personae* rather than *ratione loci*. As Khadjenouri commented, a metropolitan state which consents to a treaty acts on behalf of itself and a number of other entities whose competence to act on the international level is for some reason restricted. A statement through which the right to represent and bind dependent territories is questioned is closer to a declaration of non-recognition, which will be discussed later, than a declaration of territorial application. Only in the case where the metropolitan government restricts or modifies the application of the treaty in the dependent territory will it qualify as a reservation.³¹ However, where the entire treaty is excluded from applying to these territories a colonial declaration will not constitute a reservation. Any disagreement concerning the latter kind of statement is a dispute as to the right of representation.³²

13.3 DECLARATIONS OF DOMESTIC RELEVANCE

Formal statements belonging to this category relate to the modes and procedure for implementing the treaty norms on the national level. A contracting party may wish to inform about constitutional, statutory and administrative rules and routines that will affect the concrete implementation of the treaty norms. Generally, a treaty leaves it to the participating state to decide freely

on how the requirements of the treaty norms are to be met. Other parties may not have a major interest in knowing how the obligations of the treaty are going to be carried out in detail in the instant cases if the purposes of the treaty are fulfilled.

Declarations of domestic relevance may demonstrate only a certain view as to the distribution of powers between different authorities and as to the application of the treaty provisions. Formal statements may be politically and tactically tainted markers of spheres of influence between different state organs. In the United States both the President and Congress claim authority in the administration of international affairs and their respective spheres of power have been constantly reassessed.³³ Formal statements of domestic policy are usually initiated by the Senate and inserted in the resolution by which it gives its consent and advice to the treaty.³⁴ It forms part of the condition for the consent by the Senate and the deposit of the final instrument of ratification by the President. Statements initiated by the Senate may authorize the President to issue more concrete instructions for the implementation of the treaty obligations on the internal level, or by means of agreements of a specific kind with the other parties, or they may let certain measures of implementation pend later authorization by Congress. An example of a statement belonging to the first category is provided by the "understanding" attached to the US ratification of the 1936 Inter-American Convention on the Exchange of Publications.³⁵ This understanding indicates how the practical exchange of publications should be settled. The President was enabled to enter bilateral agreements by simple exchange of notes in order to carry out the provisions of the treaty. This declaration was not registered as a reservation by the Pan American Union being the depositary of the treaty.³⁶ The second kind of statements have been made part and parcel of the Senate consent in order to secure participation in further negotiations regarding the treaty, such as amendments or further agreements of implementation. The Senate gave its consent to the ratification of the Statute of the International Atomic Energy Agency subject to the "interpretation and understanding" that any amendment to the Statute shall be submitted to the Senate to receive its consent.³⁷ It gave its consent to the ratification of the 1929 Inter-American Arbitration Treaty with the "understanding" that the special agreements required by the treaty were only to be made by the President with the advice and consent of the Senate.³⁸ The Senate has declared that the US government was not to participate in any of the organs, body, agency or commission set up under the treaty without an act of Congress providing for such participation. Such a statement was made part of the US ratification of the 1921 bilateral treaty establishing friendly relations between Austria and the United States.³⁹ In a similar way the US Senate wanted to secure its control over the application of the 1944 treaty between Mexico and the United States concerning the utilization of boundary waters. The "understanding" attached to the instrument of ratification made it clear that no commitments for works to be built, or money to be expended by the United States should be made by executive officers prior to approval by Congress.⁴⁰

It may be difficult to decide if a statement relating to the internal implementation of a treaty and notified to the other parties has any relevance at the international level. A violation by the executive of certain conditions or rules for

fulfilling the treaty obligations set up by the Senate could be invoked as grounds for invalidating the implementation measures taken by the executive. If one was to accept the possibility of denying the validity of unauthorized implementation measures with repercussions at the international level, there would follow from this a denial of international responsibility for failure to carry out the treaty obligations. Other parties would be forced to check in every instant case if the implementation was carried out according to rules and instructions stipulated by Congress in order to determine at any moment if the treaty was still valid and effective or if it had suddenly become void because of some deviation from the prescribed implementation procedure. Such an alertness cannot be required from the other parties, which in accordance with the principle of *bona fides* must be able to rely on the validity of a ratified treaty. Not even violations of the constitutional provisions relating to the treaty-making procedure may, except under clearly delimited conditions, free the state from the treaty obligations.⁴¹ If the Senate requires that its special consent needs to be given to cover expenses that arise from the implementation of treaty norms, this may hardly be construed as a reservation even if it may happen that the necessary appropriation is denied thus making the implementation illusory. The confronted states may construe this as a breach of a treaty involving international responsibility.

The opposite case, where a statement originally intended to be of purely domestic concern loses this character once it becomes subject to the routines of treaty-making, has been adjudicated by the American courts. A formal statement of the Senate attached to its consent had been notified to the other party of a bilateral treaty and had been accepted by that state, whereafter a dispute arose as to whether this statement had as a reservation acquired the status of an international commitment that was binding upon the Federal authorities. The Niagara River Treaty of 1950 between the United States and Canada was approved on 9 August 1950 by the US Senate with the necessary 2/3 majority through a resolution consenting to the treaty with a "reservation". The purpose of the agreement was to preserve the scenic beauty of the Niagara Falls, while at the same time making available more water for hydroelectric power development in both countries. The treaty divided the additional power made available equally between the two countries, but remained silent as to how the development should be planned and executed within each country. In the United States there had been a controversy about the question of whether the development of the US share should go to the public authorities of the State of New York or to private enterprises. Congress had placed the power to decide such questions in the hands of the US Federal Power Commission. Congress in its "reservation" had declared that no project for the redevelopment of the US share of the waters made available by the treaty shall be undertaken until specifically authorized by Act of Congress. The President ratified the treaty with the "reservation" on 24 August 1950. On 21 September 1950 the Canadian Ambassador to Washington could inform the US government that the Canadian government had accepted the "reservation" of the United States. When the instruments of ratification were later exchanged, Canada reiterated her acceptance of the statement in the protocol of exchange. Subsequently the New York State Power Authority applied to the Federal Power Commission

for a licence to develop the share of power made available to the United States by the US – Canadian treaty but this was rejected by the Federal Commission. According to the Federal Power Act the Commission was competent to authorize the allocation, but due to the so-called “reservation” the Commission held that an act of Congress was required before it could act in the matter. The Commission had been of the view that the statement had as part of the treaty become the Supreme Law of the Land in accordance with Article VI of the US Constitution. The New York State Power Authority engaged Professors Jessup and Lissitzyn to refute this view. They held *inter alia* that the “reservation” had not become a part of the treaty as negotiated between the US and Canada. Both the United States and Canada had expressed the view that the statement dealt with entirely domestic affairs of the United States. The formal acceptance of Canada could not change the nature of the statement. The Canadian government had further declared in its express acceptance, that it was able to accept the declaration because it did not affect the interests of Canada. A contrary opinion had been advocated by Professor Henkin, he considered the “reservation” to be a part of the treaty as it had underwent the whole procedure a treaty has to go through in order to become effective.⁴² The US Court of Appeal for the District of Columbia reversed the decision taken by the Federal Power Commission thus endorsing the position taken by Jessup and Lissitzyn. The Canadian acceptance of the US statement did not change the character of the statement to turn it into a reservation proper. Canada’s response actually came closer to a disclaimer of interest in the matter covered by the statement than an acceptance of the statement becoming binding on herself.⁴³ The Senate’s statement could not amount to a reservation in spite of the fact that it had been designated as such and had fulfilled all the formal requirements for the formulation and entry into force of valid reservations. Even as a statement short of reservation, internationalization could not give it the character of the Supreme Law of the Land with the quality of overriding Federal statutes and decisions by Federal organs. If the US statement would have affected the interests of Canada, a closer analysis would have to be realized in order to determine if the rights and obligations of the parties were really altered. If the Niagara Treaty would have clearly stated that it was important that the exploitation of the surplus water should be made by Federal or State authorities under public control, and the Senate would have reserved its right to decide by specific act of Congress if the redevelopment of the US share should go to public authorities or private enterprises, it would appear to amount to a reservation. An unequivocal duty is exchanged for an option, a liberty.

13.4 DECLARATIONS OF INTERNATIONAL POLICY

Policy declarations dealing with the general administration of a state’s international relations do no purport on any specific provisions of the relevant treaty.⁴⁴ Sometimes such statements are peripherically related to the treaty in connection with which they are presented. The declaring state communicates that its participation in the treaty does not in any way change the policy it hitherto has followed in its international dealings, and that when applying the

treaty it will follow certain principles, or that the participation will not limit its right to safeguard certain interests. A typical example of declarations of international policy are the United States' statements relating to the Monroe-doctrine. Such a statement named a "reservation" was presented by the US plenipotentiary when signing the 1899 and 1907 Hague Conventions concerning the Pacific Settlement of Disputes. The United States declared that:

"Nothing contained in the Convention shall be construed as to require the United States of America to depart from its traditional policy of not intruding upon, interfering with or entangling itself in the political questions of policy or internal administration of any foreign State; nor shall anything contained in the said Convention be construed to imply the relinquishment by the United States of its traditional attitude towards purely American questions."⁴⁵

Such statements were not infrequent in early American treaty practice.⁴⁶ They are not as commonly resorted to nowadays, though it may happen occasionally.⁴⁷ In spite of the fact that these policy declarations are sometimes termed "reservations" they are generally not believed to constitute true reservations.⁴⁸ Some views though, such as the one presented by Podestá Costa, hold declarations concerning the Monroe-doctrine to be proper reservations.⁴⁹ According to Podestá Costa the US government secures through these statements its liberty to determine unilaterally and independently when and under which conditions the provisions will be applied.⁵⁰ The implementation of the treaty norms would by such a declaration lose its obligatoriness and become facultative. Such a view seems untenable. The declaring state could at any time declare that a norm is not any longer in accordance with its doctrine, whereas the other parties would simply have to face unilateral invocations at any given moment. The other parties being at pains to appreciate the width and bearing of the doctrine will remain in constant doubts as to the exact legal commitments of the declaring state. The principle of *bona fides*, which requires all parties to perform a treaty in good faith, being one of the basic maxims of treaty law and embraced by the preamble of the Vienna Convention, would not tolerate a state of affairs where a party maintained the freedom to decide at any moment when it considered itself as not bound by the treaty norms. Doctrines launched by a state are to a large extent obscure. They are undergoing constant modifications to meet the needs and desires of the originator state which makes it difficult for other states to appreciate its effects. The state having introduced the doctrine seems to be the sole authority to interpret and modify the doctrine. It is definitely unreasonable to require of other parties that they should be bound to accept any effects that may possibly derive from a dynamically implemented doctrine. It would certainly be irreconcilable with the principle of *bona fides* to require a party to submit to any possible consequences of a doctrine such as the Monroe-doctrine. There must be a presumption that the international engagements a state enters into are considered to be in accordance with its general policy of international relations. If a treaty is not believed to be in accordance with its foreign policy, a state will remain external to the treaty. This will favour clarity of international relations. A state being in doubt as to whether a treaty meets its political interests will not participate

in the treaty but may choose to comply to its standards in those situations it considers this to be expedient, but not on the basis of any legal obligation. By adhering to a treaty and simultaneously invoking the Monroe-doctrine, the United States is supposed to affirm that the doctrine and the treaty obligations are in harmony.⁵¹

Socialist states have regularly affixed a certain kind of statement to their signatures, ratifications or accessions. The Soviet Union has for example frequently expressed its disapproval of the fact that certain socialist states belonging to the group of so-called divided states, such as the German Democratic Republic, the People's Democratic Republic of Korea, the former Democratic Republic of Viet Nam and the People's Republic of China, had been excluded from various forms of international co-operation: membership in international organizations, participation in international conferences and multilateral conventions of universal interest.⁵² Declarations having the character of a protest have been presented to treaties which limit the right to accede to a specified group of states. It has been common to insert the so-called *Vienna formula* into the final clauses of conventions of general importance.⁵³ According to the Vienna formula a treaty is open for signing or accession by states which are either, (a) members of the United Nations, (b) one of its specialized agencies, (c) parties to the International Court of Justice, (d) members of the International Atomic Energy Agency or (e) otherwise invited by the United Nations General Assembly to join the treaty. This clause prevented some of the so-called divided states from becoming parties to the conventions of universal importance. The Vienna formula was experienced as discriminatory as it was one-sidedly excluding those of the divided states having a socialist government.⁵⁴ Declarations of this nature seem to belong to the past as all of the divided states have become either members of the United Nations or some of its specialized agencies and in this capacity are able to adhere to general multilateral conventions. These statements are evidently not reservations.

There is an abundance of various kinds of declarations concerning international policy, but due to their vagueness they would not be understood as obstructing in any way the application of the treaty norms.⁵⁵

13.5 DECLARATIONS OF NON-RECOGNITION

A state may declare on signing, ratifying or acceding that it will not by this act recognize a state or the regime of a state. It sometimes happens that such a declaration is unspecified as it does not mention which state or regime is meant, as was the case with the US statement to the 1931 Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs.⁵⁶

As a rule statements relating to the implementation *ratione personae* of treaties do indicate which regimes or states are not to be considered in treaty relations with the declaring state. Arab states often communicate declarations whereby they maintain that participation in a treaty to which Israel also is a party does not automatically mean that two states will have to enter into treaty relations with each other.⁵⁷ This holds true with regard to general multilateral

conventions. Even certain limited treaty relations have been considered possible without necessarily resulting in recognition.⁵⁸

Do statements of non-recognition constitute reservations? It would seem that this question has to be answered in the negative.⁵⁹ A declaration of non-recognition is generally a measure of prudence, a way of safeguarding a state's position in order not to enable any other state or regime to contend that the former has tacitly recognized it. If the declaration of non-recognition clearly specifies that the declaring state does not wish to have any treaty relations with the non-recognized entity or regime this neither can be considered to be a reservation. A reservation has the particular effect of altering the norm system under the treaty between reserving and confronted state, but the above-mentioned declaration excludes the implementation of the whole norm system. Reservations as a rule presume the introduction of a new norm system to replace the original. In other words, reservations imply a modification of the operation of obligations and rights *ratione materiae* but not *ratione personae* nor *ratione loci*.

If the rules on reservations were to apply to declarations of non-recognition a certain number of problems would arise.⁶⁰

The question might be put as to whether statements regarding non-recognition do limit the implementation of treaty norms which do not operate on a mutual basis, but express absolute rights and obligations. How do such statements affect the application of humanitarian treaties safeguarding the rights of the individual and restricting the modes of warfare?⁶¹ Arab states have also presented declarations of non-recognition to such treaties with respect to Israel. Jordan, Kuwait, Libya and Syria attached such statements to the 1925 Geneva Protocol on the Use of Asphyxiating Gases.⁶² All of these states declared that their accession to the Protocol did not "imply recognition of Israel". Kuwait and Syria added that nor did it lead to "the establishment of relations" concerning the provisions of the Protocol, Kuwait, Jordan and Libya also introduced the *principles of positive and negative reciprocity*. These states were only bound by the Protocol vis à vis states that had assumed the same obligations and they would be freed from these obligations against any party not respecting the obligations of the protocol. Even though Kuwait and Syria stressed that their non-recognition of Israel had the effect of denying any relations under the provisions of the Protocol, the principle of reciprocal application governs the relations between Israel and the non-recognizing Arab states.⁶³ Other Arab states parties to the Protocol which do not recognize Israel have preferred not to present any declaration of non-recognition. Such is the case with Qatar, Iran, Iraq, Sudan, Tunisia and Morocco. Only Iraq, Libya and Syria formulated declarations of non-recognition to the 1966 Covenants of Economic, Social and Cultural Rights respectively Civil and Political Rights.⁶⁴ Israel communicated in accordance with her general practice to the UN Secretary-General that the declarations of Iraq, Libya and Syria were of a purely political character and not properly presented in connection with giving consent to the Covenants.⁶⁵

A case where the operation of a Geneva humanitarian convention could possibly have been affected by a statement of non-recognition is to be found in the rules in articles 10 and 11 respectively of the Geneva Conventions entrusting

a neutral power or a humanitarian organization the tasks incumbent on the protecting power. This is to be based on an agreement between the detaining power and the power of origin. Non-recognition could make it impossible to conclude such an agreement. In the conflicts of 1956, 1967 and 1973 neither Israel nor any of the Arab states involved asked any neutral state to assume the functions of the protecting power. There was a tacit agreement between the parties to the conflicts, that some of the functions traditionally performed by the protecting power were to be carried out by the International Committee of the Red Cross.⁶⁶ The non-recognition of Israel therefore did not prevent *de facto* the application of the provisions of the 1949 Prisoners of War Convention. A subcategory of declarations of non-recognition are those statements by which a party announces that it will not recognize the sovereignty of another state over a territory it claims for itself. Such declarations have been presented by Guatemala with respect to Belize, formerly British Honduras, and by the Argentine Republic with regard to the Islas Malvinas, or Falkland Islands, and the South Sandwich Islands when adhering to treaties to which the United Kingdom is also a party.⁶⁷ Such declarations of non-recognition may be formulated in general terms, or they may to a certain degree be specified as to their effects.⁶⁸ Such statements do not constitute reservations although they are occasionally designated as such.⁶⁹

13.6 DECLARATIONS OF INTERPRETATION AND APPLICATION

A large group of statements bear upon the understanding of the treaty text. Through such statements a state declares how it will understand certain of the provisions in the treaty. One of the very interesting questions in reservation law is the problem of the nature of such interpretative declarations. This problem must naturally be solved before one can decide if these statements may be governed by the rules on reservations. Interpretative declarations are somehow related to declarations of policy. But, whereas policy declarations will indicate the general atmosphere in which the treaty is going to be understood interpretative declarations focus on correct reading of a certain or certain provisions of the treaty.

Statements may also relate to the question of the predominance of one established norm over another equally established norm. Because these statements do not in the first hand concern the understanding of a text, but the hierarchy between two or more norms which have already been established by an interpretation of the relevant texts, they would be more properly called declarations of application. Because they have many things in common with interpretative declarations, the views which are going to be presented with respect to interpretative declarations will also embrace declarations of application.⁷⁰

Due to the complexity of the problem of the nature of interpretative declarations these declarations will be discussed more exhaustively in the latter part of this thesis.

CHAPTER 14

THE ADMISSIBILITY OF RESERVATIONS

As the Vienna Convention is based on the maxim of the consensual character of norms of international law, and reservations intend to introduce a different set of norms in lieu of the norms as adopted in the final treaty text, the replacing norms must receive the consent of the other parties to become operative just as the original treaty norms and amendments thereto. According to the basic principle of the Vienna Convention, no reservation may become binding on another party before it has accepted the reservation. Although reservations are individually initiated (as a rule), they must be based on an agreement before becoming legally effective. A reservation has to be both acceptable and accepted before entering into operation.

The Vienna Convention states clearly that two conditions must be fulfilled before a reservation may become binding:

- (a) A reservation must be *admissible*, that is, in principle acceptable.
- (b) A reservation must further be accepted in order to become binding and *opposable* to another party.

The requirements of *admissibility* and *opposability*, which both have to be ascertained before deciding upon the validity of reservation, are treated separately in articles 19 and 20 of the Vienna Convention.¹ The distinction between these two conditions of validity has posed certain semantic problems to the drafters of the reservation rules, especially the rules in article 19 on the admissibility of reservations. Article 19 speaks about the conditions for “formulating” reservations instead of “making” them. Already in the preparatory work of the ILC the rapporteur discarded the term “make” as this was according to him alluding that a reservation would become valid and effective from the moment of its communication.² This article was to state the basic rule on the admissibility of reservations by enumerating the three occasions, when it was not possible to present reservations. The silence of the treaty with regard to reservations is now presumed to allow for reservations to be initiated, in contrast to the formerly dominating view that such silence was assumed to be a prohibition against reservations.³

As the question of admissibility of reservations is not to prejudice the question of opposability, a less committing verb than “make” had to be found. If reservations were “proposed” it was generally understood that a proposed reservation did not amount to a binding reservation. However, even this expression did not seem to be completely satisfactory. In those exceptional cases where reservations are specifically authorized by the treaty, they are clearly admissible and even on certain conditions accepted in advance.⁴ A specified authorization of a reservation does not only mean that there is a liberty to present a reservation but also a right to make one. Such a reservation does not

need any further acceptance from the other parties, but becomes established from the moment it is communicated if this happens after the treaty has entered into force. For such reservations the expression "propose" was not suitable, but the expression "make" was positively so. The term "to formulate" was introduced as being a neutral one that would cover both situations, the proposal of admissible reservations and the making of specifically authorized reservations. The ambiguity of the term "formulation" has been believed to be a nuisance especially as the term on various occasions had been used as being synonymous with "making".⁵ It would seem as if usage has not been consistent but more or less wavering and vague.⁶ The concrete problems arising from the drafting of articles 19 and 20 on the admissibility and the acceptance of reservations has forced the drafters to clarify precisely their terminology giving the word "formulate" a meaning that covers both the case where an admissible reservation may be proposed, perhaps becoming accepted and thus opposable, perhaps becoming objected to and thus inopposable, and the case where a reservation becomes valid and opposable from the moment it is presented because acceptance can be construed as given in advance by subscribing to the specific authorization in the treaty. Even if it would be proved that the term "formulate" had consistently been used as a synonym for "make", nothing really hinders the widening of the scope of the meaning of the original term.⁷ The criticism of the use of the term "formulate" is certainly the result of an adherence to the referential theory of definition, where the ideal is that each word should refer to a single phenomenon. However, we have to live with the fact that the Vienna Convention deliberately presupposes a dual use of the term "formulate" covering the cases where there is a right 'to make a reservation' which the other parties are obliged to recognize, and the cases where there is only a liberty 'to propose a reservation' no other party having the obligation to approve of such a reservation. There does not seem to be any danger in permitting the ambivalence of the term, as far as its double function is evident. The requirement that a reservation should be admissible is formulated in absolute terms.⁸ This requirement has to be satisfied, before a reservation may be validly opposed to other parties of the treaty. Article 19 of the Vienna Convention enumerates three categories of reservations that are deemed to be inadmissible:

- (a) Reservations that are *expressly prohibited* by the treaty
- (b) Reservations that do not belong to those reservations that are *preclusively permitted* by the treaty
- (c) Reservations that are *incompatible* with the object and purpose of the treaty.

The Vienna Convention regime confirms the inversion we have experienced from an originally negative attitude towards reservations to a basically favourable attitude, admitting reservations in all other cases than those exhaustively listed under article 19.

14.1 THE EXPRESS PROHIBITIONS AGAINST RESERVATIONS

It would be laudable if the drafters of a treaty managed to indicate the provisions that contain norms from which derogation could not be permitted as such derogation would endanger the effective operation of the treaty.

We do have certain categories of treaties to which reservations as a general rule are not permitted notwithstanding the fact that the treaties themselves do not contain any express prohibitions. Reservations to the ILO conventions, are as a rule not admitted.⁹ The rigidity of such a general prohibition is softened by the possibility of a right of option with regard to certain parts of the convention and the exemption of developing areas from the fulfilment of certain obligations.¹⁰

Treaties may expressly prohibit reservations to all of its provisions. Article 20 of the 1952 Universal Copyright Convention prohibits any reservations to the convention. Such a categorical prohibition is also to be found in article 27 of the 1964 Convention for the Unification of Certain Rules Relating to the International Carriage by Air, and in many other conventions.¹¹ Some categories of treaties are more susceptible to categorical prohibitions against any kind of reservations, as for example commodity agreements or treaties containing the constitutions of international organizations.¹² There are also weighty reasons to ban reservations from treaties which prohibit certain armaments or demilitarize certain areas.¹³ Such treaties are supposed to become effective only if all parties comply with the integral norm system.

Treaties may prohibit reservations to only some of its provisions. Article 42 of the 1951 Convention Relating to the Status of Refugees prohibits reservations to articles 1, 3, 4, 16(1), 33 and 36–46. Similarly article 12 of the 1958 Geneva Convention on the Continental Shelf prohibits reservations to articles 1–3. Article 19 of the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas prohibits reservations to articles 6, 7, 9, 10, 11 and 12. The 1982 Convention on the Law of the Sea excludes in its article 320 the possibility of reservations to all parts of the convention except those where reservations are expressly permitted. Often reservations are inadmissible to those provisions which provide legal definitions.¹⁴ Any modification of the basic definitions easily challenges the whole operation of the treaty and contravenes its purpose.

Even when reservations are prohibited by the treaty, there seems always to exist the possibility of providing for an exception from the prohibition by a common agreement between all the parties.¹⁵

14.2 THE PRECLUSIVE PERMISSION TO FORMULATE RESERVATIONS

Treaties may also explicitly state which reservations may be formulated. Permitted reservations may be specified in various ways. This may be achieved by indicating the contents of the reservation and the parts and provisions of the treaty that may be derogated from. A closer presentation of different reservation clauses will be delivered in the chapter on the acceptance of reservations.¹⁶

The Vienna Convention has settled for the solution that only preclusive authorizations imply a prohibition of reservations to those treaty provisions which are not mentioned by the permission. If a clause permits only reservations of a certain kind or to certain provisions, this will preclude the entering of reservations of another kind or to the other provisions. This rule is of a relatively recent date. Within the ILC there was a generally shared assumption that a plain permission to formulate reservations of a certain kind, or to certain provisions, did prevent the formulation of reservations other than those indicated in accordance with the principle of *expressio unius est exclusio alterius*. A rule of this content was part of the 1962 and 1965 drafts of rapporteur Waldock.¹⁷ It was still part of the Final Draft Articles on the Law of Treaties submitted to the UN General Assembly in 1966.¹⁸ The amendment that Poland proposed during the Conference on the Law of Treaties and which was adopted, was as important as it was short. Poland proposed the insertion of the word "only" between the words "authorizes" and "specified" into draft article 16 concerning the formulation of reservations which thus was to read as follows:

"A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

- (a) —
- (b) The treaty authorizes *only* specified reservations which do not include the reservation in question;"¹⁹ (emphasis added).

The Final Draft of the ILC considered that the express authorization of "specified" reservations made all other reservations inadmissible.²⁰ The provision as finally amended reversed this rule. An authorization of certain reservations did not preclude the formulation of other reservations except in those cases where the authorization was unequivocally preclusive, admitting only reservations which were one way or another individualized. The adoption of the Polish amendment was a further proof of the profoundly changed attitude to the capacity of states to formulate reservations.²¹ The Vienna Convention now stands for quite a liberal view. Whenever there is a slight doubt as to the admissibility of reservations, the presumption is in favour of a liberty to formulate reservations. The final solution may be justified by the fact that drafters of a treaty text and a reservation clause can hardly foresee all the manifold grounds that may induce states to enter reservations.²² Negotiators may pay attention to some situations that may warrant reservations being completely unaware of other future needs for disentanglement from commitments under the treaty.

14.3 THE COMPATIBILITY REQUIREMENT

The introduction of the compatibility test in order to determine the admissibility of reservations in those cases where the treaty is silent was believed to satisfy the strongly manifested demands for safeguarding the integrity of

treaties. The view had been widely shared that by obstructing the integral application of treaties, reservations were jeopardizing the operation of the treaty norms. The less modifications were inflicted upon a treaty the more effective it was supposed to become. Although the ICJ advisory opinion was largely inspired by the Pan-American reservation regime, an unlimited liberty to present reservations was not believed to be desirable.²³ The Court believed that the object and purpose of the Genocide Convention "... limit ... the freedom of making reservations ..."²⁴ The compatibility of a reservation with the object and purpose of the treaty was a notion which was foreign to the Pan-American regime.²⁵

In both favouring a liberal reservation regime and in requiring reservations to be compatible with the object and purpose of the treaty, the 1951 advisory opinion was heavily criticized as amounting to a reasoning *de lege ferenda* and not *de lege lata*. Only the latter entered into the competence of the Court.²⁶ Not least within the ILC was there an irritation about the argumentation of the ICJ.²⁷ In spite of initial opposition to a flexible reservation system, the ILC finally settled for the liberal rule that had been developed within the OAS, but only in combination with the compatibility criterion.²⁸ Article 19(1)(c) now plainly states that a state may not formulate reservations that are "incompatible with the object and purpose of the treaty".

The wording of article 19(1)(c) was the matter of certain disagreement during the preparatory work. During the Vienna Conference amendments were submitted by the United States together with Colombia to substitute the conjunctive expression "object and purpose" for the disjunctive expression "character or purpose" and by Spain to insert the word "nature" in front of the expression "object and purpose of the treaty".²⁹ The motive behind these amendments was seemingly to give the compatibility requirement as wide a scope as possible. The United States clarified its position as to the determination of the non-compatibility of a reservation, which had to be decided with regard to the origin and character as well as the institutional structure within which the aim of the treaty had to be realized.³⁰ These amendments were not approved. It is not certain if this was because of the unwillingness to give the compatibility criterion too wide a bearing. The Drafting Committee motivated its rejection by stating that the expression 'object and purpose' had been established within international legal language. It feared that any detraction from established legal terminology would introduce an element of uncertainty among the appliers of the Vienna Convention. The representatives of the Soviet Union and Hungary opposed the US and Colombian amendment because they considered the term "character" too vague.³¹ After the vote on the article concerning the admissibility of reservations the US delegate, Stevenson, expressed his view as to the correct understanding of the expression finally adopted. He contended that the expression chosen ought to be given a broad meaning, which would have been more clearly stated by the wording proposed by the United States. He buttressed his view by citing those parts of the advisory opinion of the ICJ that were speaking in favour of a wide understanding of the compatibility requirement.³² Although the expression 'object and purpose' has an established usage, it still has a certain vagueness about it, which would allow a wide understanding as was advocated by the United States. The criticism uttered by the

representatives of the Soviet Union and Hungary against the US position foreshadows future problems in making the compatibility test work.

The propagators of the compatibility test have argued that it was supposed to be based on completely objective criteria.³³ However the drafters of the Vienna Convention were not able to agree on any general procedure for the authoritative ascertainment of the compatible or incompatible nature of a reservation. Waldock presented at the 1962 session of the ILC two alternative solutions for determining the compatibility of reservations.³⁴ According to alternative A it was up to each state to evaluate whether a reservation was compatible or not. According to alternative B the decision on the compatibility was to be taken collectively. In the case where the treaty had been drawn up at a conference convened by the states concerned, the decision had to be taken by the same majority that was necessary to adopt the treaty text at the conference.³⁵ If the conference had been convened by an international organization or the treaty was drawn up within an international organization, the question of compatibility was to be decided upon by the competent organ.³⁶ Alternative B providing a collective procedure for determining the compatibility of a reservation did not meet any larger support.³⁷ Opposition to a majority rule may be partly explained by the fact that reservations were often a result of a state being outvoted and wanting to safeguard its particular interests against the majority. The possibility to decide upon the compatibility of a reservation by means of a majority rule would make the liberty to formulate reservations illusory. In spite of further proposals for determining the compatibility of reservations on a more objective basis, the ILC finally abandoned any attempts to propose a collegiate or judicial procedure for the analysis of reservations.³⁸

During the Vienna Conference new initiatives were taken to have an authoritative procedure adopted for deciding upon the compatibility of reservations. In a joint amendment by Japan, the Philippines and South Korea the following procedure was proposed: In the case where a contracting state claimed that a reservation was against the aim and purpose of the treaty, and the majority of contracting states within 12 months made objections, the signature, the instrument of ratification or accession, should be without effect.³⁹ India's amendment was more detailed. Reservations were incompatible and thus invalid if a third of the states concerned objected to them. The number of states that were entitled to declare a reservation incompatible, had to be determined differently depending on whether the treaty had entered into force or not. In the latter case the majority was constituted by such a number of states as would bring the treaty into force. In the former case one third of the states parties to the treaty at the time of deposit of the reservation were able to declare a reservation incompatible within 3 months of the date they had been notified of the reservation.⁴⁰ The weakness of this proposal was that once the treaty was in force only the signatory parties were able to participate in this decision, although later adhering states had an equal interest in presenting their view as to the nature of a reservation. If the number required to make a treaty enter into force was very low it did not need many states to debar a reserving state from becoming a party to a treaty by agreeing to consider a reservation incompatible.⁴¹ Australia's proposal for a collegiate procedure required a 2/3 majority of all negotiating states plus the states having already ratified the

treaty.⁴² This procedure could be criticized, because states participating in negotiations are not always assumed to have a clear intention to ratify the treaty. A 'disinterested' state would have the chance to bar a reserving state from participation in a treaty and this may seem an unjust solution. No proposals were made at the conference to refer questions of compatibility of reservations to settlement by a judicial organ.

In spite of the many proposals for a particular machinery to decide upon the question of whether reservations were compatible or not, the Vienna Convention remains quiet on this point. The result of this absence of any regulation is that every state has to make this decision independently. As Ago put it in the 1962 session of the ILC, the compatibility of reservations was an objective criterion which could only be applied subjectively.⁴³

On some occasions the compatibility could be settled objectively according to some established procedure. The Vienna Convention itself mentions two categories of treaties where the compatibility of reservations is not supposed to be decided upon individually. These are treaties that are constituent instruments of international organizations or *organizational treaties* (article 20(3)) and treaties concluded between a limited number of states or *restricted multilateral treaties* (article 20(2)).⁴⁴ The parties to such treaties are prevented from acting individually with regard to reservations. If the confronted states are not allowed to accept or object independently to reservations it means *a fortiori* that they may not take an individual stand towards the question of compatibility. With regard to the first category the competent organ of the organization will decide on the nature of the reservation. With regard to the restricted multilateral treaties all parties in unison have to agree on a common attitude.

Some treaties may themselves provide the means for an objective determination on the compatibility of reservations. Such is the case with all those agreements containing clauses on obligatory disputes settlement procedures, which require that disputes relating to the interpretation or application should be submitted to the ICJ or a court of arbitration. Disagreement on the nature of a reservation may be classified as such a dispute connected with the interpretation and application of a treaty. A specific reference to the compatibility of reservations is made in article 20(2) of the 1966 International Convention on the Elimination of All Forms of Racial Discrimination which furnish the following procedure for establishing the presence of compatibility or incompatibility:

"A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. A reservation shall be considered incompatible or inhibitive if at least two thirds of the States Parties to this Convention object to it."⁴⁵

Where particular treaties set up clearly regulated procedures for a collective acceptance of reservations the question of the compatibility will also be settled indirectly but on more objective grounds. Once a reservation has been accepted for example by a certain prescribed majority decision, it must be assumed that

its compatibility is also established. Thus, we find in the 1961 Single Convention on Narcotic Drugs a procedure for collegiate acceptance of reservations which will help to determine the compatibility of a reservation:

“A State which desires to become a Party but wishes to be authorized to make reservations other than those made in accordance with paragraph 2 of this article or with article 49 may inform the Secretary-General of such intention. Unless by the end of twelve months after the date of the Secretary-General’s communication of the reservation concerned, this reservation has been objected to by one third of the States that have ratified or acceded to the Convention before the end of that period, it shall be deemed to be permitted, it being understood however that States which have objected to the reservation need not assume towards the reserving State any legal obligation under the Convention which is affected by the reservation.”⁴⁶

If less than one third of the contracting parties repudiates a reservation, it must be considered as admissible and therefore compatible with the convention. Objecting states are nevertheless free to maintain their objections and free to exclude any legal obligations with regard to the reserving state.⁴⁷

Although it has frequently been underlined that it would be of utmost advantage if treaties themselves clearly stated which parts of a treaty were of such fundamental importance that reservations to them could not be tolerated, it has not been easy to agree upon reservation clauses.⁴⁸ The negotiators of the 1958 Geneva Conventions on the Law of the Sea were not able to agree on which parts of the Convention on the Territorial Sea and Contiguous Zone and the Convention on the High Seas reservations were to be permitted, as had been possible in the case of the Continental Shelf and Fisheries Conventions.⁴⁹ With regard to regionally and substantially limited treaties the conditions may be more favourable for reaching an agreement as to the fundamental norms that may not become the object of reservations.⁵⁰

Not much guidance is to be found in the preparatory work of the Vienna Convention as to what kind of reservations are to be regarded as incompatible. Some members of the ILC presented examples of incompatible reservations. These would be reservations denying the obligation to install at the main ports facilities for the disposal of oily residues from ships’ tanks in accordance with the 1954 Convention for the Prevention of Pollution of the Sea by Oil.⁵¹ The same was the case with reservations ‘excluding’ the provisions for technical control inserted in the 1958 Fisheries Convention, and in denying international liability for damage caused by space vehicles embraced in conventions on the subject-matter of outer space.⁵² Reservations which stated that certain treaty provisions of the Convention on the Political Rights of Women were not applicable or that certain posts were not open to women were stated to conflict directly with the very purpose of the convention.⁵³ Among human rights treaties a reservation that would affect a provision from which even in a state of emergency no derogation could be made, would probably be incompatible.⁵⁴ Where derogations are not permitted the reservation would not be allowed. This would apply to ‘excluding’ reservations. ‘Modifying’ reservations could however not be condemned that categorically. The Guatemalan reservation to article 4(4) of the American Convention was not considered by the Inter-American Court of Human Rights to be as such incompatible. It

interpreted however the reservation restrictively.⁵⁵ Where a reservation would stand for the non-acceptance of the obligation to conserve endangered species with respect to a certain number of those species listed in a convention on conservation, this would “frustrate the object of the treaty”.⁵⁶ However neither the ILC nor the Conference managed to elaborate any objective criteria for determining the compatibility or incompatibility of reservations. It had been further suggested that reservations which ‘exclude’ the compulsory jurisdiction of the ICJ or another tribunal would definitely qualify for incompatible reservations.⁵⁷ The denial of any compulsory jurisdiction was believed to have a deteriorating effect on the operation of the treaty. Nevertheless, this kind of reservation belongs to the more common type of reservations and their presentation is no longer considered as excluding the reserving state from participation in the treaty or to invalidate its reservation.⁵⁸ The International Court of Justice presumably did not hold such reservations to be incompatible when it gave its advisory opinion in 1951. The reservation to the Genocide Convention, which were the reason for requesting an advisory opinion, were to a large part related to article IX on the compulsory jurisdiction of the ICJ. In spite of the views that the reservations to article IX were especially questionable, the ICJ favoured a liberal stand towards them.⁵⁹

As mentioned above, treaties stipulating a compulsory settlement of disputes by an international tribunal would provide the machinery for objective evaluation of the compatibility of a reservation. This possibility is not present where the clause on compulsory jurisdiction is itself ‘excluded’ by the reservation. The compatibility of such a reservation cannot be checked by any unilateral submission of the question to the tribunal, but may only occur where both parties to the conflict by an *ad hoc* agreement decide to refer the matter for adjudication.⁶⁰ Nowadays there are a number of treaties which explicitly admit that clauses on compulsory jurisdiction may be ‘excluded’.⁶¹ It would thus appear that such reservations cannot be construed as being incompatible. This will only be a general presumption. The reservations by some states to ‘exclude’ the disputes settlement procedure under the Vienna Convention were condemned by one of the contracting states to be incompatible.⁶²

14.4 THE EFFECT OF PRESENTING INADMISSIBLE RESERVATIONS

The Vienna Convention is silent in the matter of the effects of an inadmissible reservation. The manifest inadmissibility of a reservation may lead to the following situations:

- (a) Only the reservation is without effect. The reserving state remains bound by the integral treaty.
- (b) The inadmissibility of the reservation affects also the final consent to be bound by the treaty. It invalidates the signature, the instrument of ratification, acceptance or accession. The reserving state does not become a party to the treaty.

Of the rapporteurs on the law of treaties Lauterpacht and Fitzmaurice supported the first alternative.⁶³ Reservations practice shows that objecting states may prefer the first solution. This was the view of the British government on the French reservation in the *Anglo-French Continental Shelf* arbitration.⁶⁴

If the reservation was not of primary concern for the reserving state in participating in a treaty the reservation may be deemed invalid and the consent unrestricted. If the reservation was however an absolute condition for participation and withdrawal is unthinkable then even the final consent is invalidated. The reserving state remains outside the treaty.

In any case the view of the declaring state has to be ascertained.⁶⁵ A reserving state can hardly be asked to participate in the integral treaty against its will.

If the provisions of the treaty are separable, then we may have a situation which resembles the one that arose in connection with objections to the Syrian and Tunisian reservations to the Vienna Convention. The state formulating a prohibited or incompatible reservation may be in treaty relations only under certain parts of the treaty.⁶⁶

CHAPTER 15

THE OPPOSABILITY OR INVOCABILITY OF RESERVATIONS

As a result of the laborious preparatory work on the Vienna Convention a clear distinction has finally been made between the admissibility and *opposability* of a reservation. This adroit distinction was only achieved at a rather late date in the elaboration of the Vienna Convention text whereas earlier the drafters were not capable of discriminating between these two concepts. The arrangement of the reservation rules reflects the intention to make the separation a precise one. Article 19 establishes the admissibility of reservations as an absolute condition for the validity of reservations, whereas article 20 regulates the acceptance as a relative condition for their validity. A reservation that is both admitted and accepted becomes binding. Being admitted means only that a reservation is acceptable — but not that it as such would become binding on the other parties. As well as being admitted a reservation must also be accepted before being opposable.¹ A reserving state whose reservation has been accepted may *oppose* this reservation to the other parties, who will have to recognize it as valid, legally binding on them.² Every contracting state that is confronted with an admissible reservation has the discretion to choose between accepting or objecting to the reservation. Treaties may provide for authorization of specific reservations, in which case a reservation becomes binding, and opposable from the moment it is notified provided that the treaty is in force.³

An acceptance of an inadmissible reservation is theoretically not possible. Directly or indirectly prohibited reservations under article 19(1)(a) and (b) cannot be accepted by any confronted state. Such reservations and acceptances of these will not have any legal effects. The prohibition may however be rescinded or suspended through common agreement between all the parties.⁴

Similarly, an incompatible reservation under article 19(1)(c) should be regarded as incapable of acceptance and as *eo ipso* invalid and without any legal effects. The trouble is that the possibilities to determine the incompatibility of a reservation in an authoritative and generally binding way are limited. As far as no objective procedure is available every party will make this evaluation individually. Such individual appraisal of the compatibility will not affect the position of the other parties. We will therefore face situations where a reservation is considered compatible by some states and incompatible by others. Those states which believe the reservation to be compatible will have the liberty to choose between accepting the reservation or objecting to it.⁵ States believing the reservation to be incompatible may either contend that the reservation is without value and the treaty binding in its entirety, or that all treaty relations are excluded between them and the reserving state.⁶ The position of such a reserving state hovers in a state of uncertainty. There is always a possibility that the question of compatibility of a reservation will turn into a major dispute among the parties. If this dispute is brought by the parties to a settle-

ment by adjudication or other authoritative means and the incompatibility of the reservation established in a binding way, the possible acceptance by some parties is invalidated together with the reservation.⁷

The acceptance of an admissible reservation is an individual act. It does not prejudice the position of the other confronted states which may decide to object to the same reservation.⁸ The Vienna Convention thus paves the way for what has been called a "fragmentation" of a multilateral compound of norms into an agglomeration of bilateral relationships in accordance with the Pan-American regime. Propagators of the unanimity rule considered that such a disintegration of multilateral into bilateral relationships brings chaos into treaty relations. The unanimity rule was also in danger of such a fate. Merely because passivity has been quite liberally construed as tacit acceptance, we have to accept the fact that many conventions from the era of the unanimity rule disintegrated into two or more sets of legal relationships. However, because an accepted reservation does not have repercussions on the relationships between the confronted states, a determination of the legal relations between the parties on a bilateral basis cannot be avoided. Modified treaty relations bind the reserving state to each individual confronted state. Integral treaty relations govern the dealings between the confronted states.

It is important to add that admissibility and opposability are two distinct concepts, which under certain conditions may overlap each other. The case of *authorized reservations* will provide an opportunity to look more closely at the delimitation of these two concepts.⁹

CHAPTER 16

ACCEPTANCE OF RESERVATIONS ACCORDING TO THE VIENNA CONVENTION

The Vienna Convention rules show clear signs of a compromise even if they are based mainly on the flexible rules of the OAS. To become operative and opposable a reservation has as a rule to be accepted. The Vienna Convention does in principle not institute an absolute right (a claim-right) to make reservations, but only a liberty to formulate them. Owing to the fact that the Convention does not provide for a collegiate or judicial procedure to decide upon the admissibility and the acceptance of reservations, the confronted states will generally be at liberty to accept or object to reservations individually.

The Vienna Convention does not allow for individual acceptance with respect to two categories of treaties. To the restricted multilateral treaties the unanimity rule still applies.¹ Such treaties regulate matters between a limited number of states. However, this condition is not sufficient. It is further required that the application of the entire treaty between all parties is an essential condition for consenting to the treaty. Under such treaties the relations between the parties are so closely interwoven, that any alteration in the legal relations between two parties has inevitable repercussions on the relations among the other parties. The legal relations are not operating simply on a mutual basis. As examples of such multilateral treaties have been mentioned agreements on economic integration, treaties relating to the building of a hydroelectric dam or scientific installations, and treaties between riparian states relating to the development of a river basin.² The Vienna Conference seemed to give a narrow meaning to the notion of restricted multilateral treaty. Amendments that had the aim of establishing the numerical and integrative criteria as disjunctive, did not achieve the necessary majority.³ These criteria appear now conjunctively in article 20(2).

The other exception is provided by the category of treaties which form constituent instruments of international organizations. Even with respect to these organizational treaties it is not correct to construe them as a simple sum of bilateral relations.⁴ Members of international organizations have not only rights and obligations with regard to each other but also identical commitments to the common goal that the international organization is to realize. If reservations to constituent instruments of international organizations would become effective on the basis of one single acceptance, the organization will easily find itself in the situation where it is not able to function properly. The rule that individual acceptance of reservations to organizational treaties is not possible has been confirmed by earlier practice. Reservations to constituent instruments have as a rule been referred to the competent organ for consideration. The commonly cited example is the US statement to the statute of the International Refugee Organization.⁵

With regard to these treaties the determination of the admissibility of a reser-

vation and its acceptance converge. Once the parties or the competent organ have agreed on the admissibility of the reservation it is accepted and enforceable.⁶

16.1 EXPRESS ACCEPTANCE

Article 23(1) of the Vienna Convention requires that an express acceptance must be formulated in writing and communicated to the contracting states and other states entitled to become parties to the treaty. In practice such formal acceptance does not occur very frequently. One instance of a formal express acceptance is the written statement from the government of the FRG with respect to the French reservation of 1979 to the 1931 Convention on the Uniform Law of Cheques saying that, "The Government of the Federal Republic has taken note of the communication of the French Government . . . and raises no objection thereto."⁷

In the past reservations were considered as having been expressly accepted if they were presented at the moment when the treaty was collectively signed.⁸ They were usually the expression of a consistent attitude, already made known to the other states during the negotiations. The text of the reservation may be affixed to the signature of the representative of the reserving state or already printed beneath the text in the treaty instrument. Reservations were also being inserted in a separate protocol or *procès-verbal* of signature which was signed at the same time as the treaty proper by the reserving and other states.⁹ Through the act of signing the treaty and the possible supplementary protocol containing the written or printed reservation the acceptance was undeniable. When reservations were presented at this moment the confronted states had an opportunity for consultation in order to pursue a common line of action, asking for a clarification of the intentions behind a reservation and perhaps joining in their efforts to persuade the reserving state to abandon or modify its reservation. This is still the common practice with respect to the Convention and other acts of the Universal Postal Union (UPU). Article 22(6) of the 1964 Vienna Constitution confirms the practice in force since the London Congress in 1929 by providing that the Final Protocols annexed to the Acts of the Union shall contain the reservations to these Acts. Countries that wish to avail themselves of a reservation will have to submit it in the form of a proposal to the Postal Congress for confirmation and insertion in the Final Protocol of the Act to which it relates. Member states may not formulate reservations after signature of the Acts of Congress.¹⁰ Reservations to the regulations elaborated under the auspices of the International Telecommunication Union (ITU) are as a rule presented on signature and inserted in the Final Protocol. Reservations may however also be presented on ratification.¹¹ An acceptance may also be construed as express with regard to reservations formulated in connection with the ratification, if a protocol or *procès-verbal* is drawn up to record the deposit or exchange of ratifications. By signing this protocol or *procès-verbal* the contracting states agree also to the reservations included in the protocol.¹²

As the treaty-making procedures have changed through time, partly due to

the increasing number of states participating in the elaboration and adoption of treaty texts, it has proved appropriate not to bind the acts of signing or accepting for deposit instruments of ratification to one single moment. The Red Cross Convention of 1864 was the first multilateral treaty that allowed for its signing during a certain period from its formal adoption.¹³ The revised Red Cross Convention of 1906 went a step further by admitting not only the negotiating states to sign within a certain period, but also those other states that had signed the original convention of 1864. Finally, the 1925 Opium Convention was opened for signature for a period of over 7 months to all states.¹⁴ Treaties may also be open for signature during an unlimited period of time, of which the best known example is the Statute of the Permanent Court of International Justice.¹⁵ Instruments of ratification are nowadays received for deposit when they are communicated to the depositary. The preconditions for an instant and co-ordinated reaction towards reservations presented at the moment of signing and ratification are not the same. Information about signatures and ratifications subject to reservations are now notified to the parties or other states entitled to become parties to the treaty.¹⁶ Naturally, instruments of accession will follow the same procedure of communication and notification. Situations which may be construed as express acceptance of reservations have become fewer. Acceptance has become predominantly tacit.

16.2 TACIT ACCEPTANCE

Owing to the fact that signatures and deposit of ratifications were allowed to occur at different moments any demands for express acceptance of reservations turned out to be ever less feasible. The need for certainty and stability in treaty relations made it necessary to construe silence by the contracting states as an acceptance. It was not considered advisable to admit a situation where the relationship between reserving and confronted states was left pending for an unlimited period.¹⁷ Propositions that passivity would have to be construed as acceptance appeared quite early and were soon taken over by the vast majority of writers.¹⁸ Some international lawyers though did stubbornly maintain the view that acceptance always ought to be express.¹⁹ The practice and the rule of tacit acceptance did not go together well with the view of the fundamental importance of the integrity of treaties. The representatives of certain states were not eager to recognize the possibility of tacit acceptance, this, *inter alia*, became evident in connection with the advisory opinion of the ICJ.²⁰

Tacit acceptance may be construed in two different ways. A state that gives its final consent to be bound by a treaty is considered as having tacitly accepted those reservations that have been proposed by another state having earlier consented to the treaty. Such reservations are deemed to have come to the notice of states consenting later to the treaty. The depositary has the obligation to inform all states entitled to become parties to the treaty of all notifications and communications that somehow relate to the treaty. The act of signing, ratifying or acceding amounts to giving one's consent to the treaty text proper and those various reservations that have been formulated to the treaty and notified to the other states concerned. The act of consenting to the treaty implies

the acceptance of the reservations that have been made known by the depositary. This is the case of *implied acceptance*. A state consenting to the treaty will have to affix to its instrument of ratification or accession a formal statement rejecting the reservation if it wants to avoid the situation of being unwittingly bound by a reservation it does in fact not favour.²¹

The major problem with a rule on tacit acceptance concerns the cases where reservations appear after the moment a confronted state has consented to be finally bound by the treaty. In this situation acceptance may not be inferred from the occurrence of a certain positive act, such as the signing, the deposit of an instrument of ratification or accession. Acceptance could only be inferred from the silence of the confronted state (*tacit acceptance proper*). It was evident that tacit acceptance in such cases could not be established instantly at the moment of notification but only after a reasonable time from that date. A too long period could not be admitted, because this would result in a protracted period of uncertainty as to the legal relations between the reserving state and the confronted parties. Nor should the period be too short. That again would not leave enough time for the confronted states to undertake the necessary analysis of the possible effects a reservation may have for them.

Treaties containing reservation clauses have varying stipulated periods of three, six and twelve months for reactions. The Vienna Convention settled for the 12-month rule in its article 20(5) in accordance with the rule applied within the OAS since 1959.²² The time limit stipulated in the Vienna Convention is facultative. Any treaty may settle for a longer or a shorter period.

If the possibility of reservations to bilateral treaties is accepted the rules in article 20(5) of the Vienna Convention would apparently not apply to them. Article 20 paragraphs 2–4 are unambiguously not applicable to bilateral treaties. The whole section had originally been termed “Reservations to multilateral treaties”, which did suppose that the drafters intended to regulate only the acceptance and objection of reservations to multilateral treaties. The final elimination of any reference to multilateral treaties was agreed upon so as not to prejudge the question of the possibility of reservations to bilateral treaties. This action does not provide any grounds for assuming that the rules on acceptance and objections under 20(5) ought to be applied to bilateral treaties.²³ There is ample reason to believe that at least the rule of tacit acceptance is not going to be applied to bilateral treaties. In practice there will hardly occur cases where the other non-reserving party remains quiet as to a reservation, but will always in one way or other show its attitude towards it.²⁴

With regard to restricted multilateral treaties which were still to be ruled by the unanimity principle, the rule of tacit acceptance was adopted. This rule is facultative and there may be agreed upon different regimes within the framework of regional co-operation.²⁵ Tacit acceptance of reservations to organizational treaties will not be possible. Treaties regulating certain specific matters may also require express acceptance. This is the case with the 1960 Convention on Third Party Liability in the Field of Nuclear Energy (art. 18).

The rule of 12 months relates to the acceptance of admissible reservations. The question may be put if this rule of tacit acceptance is of any relevance at all for determining the compatibility or incompatibility of a reservation. As the

normal situation will be that each state will have to decide the compatibility of a reservation for itself, the silence of the confronted states may pose a dilemma. Can compatibility be established on the basis of passivity? Can the 12-month rule concerning acceptance of admissible reservations also be invoked to construe the compatibility of the reservation? This problem can be approached in two different ways. Firstly, we may look at the logical structure of the reservation rules in the Vienna Convention. Secondly, we may try to find out if this problem has been thought of and whether the drafters of the Vienna Convention did possibly reach a common understanding on this matter.

(1) A closer look at the arrangement of the reservation rules in Part II section 2 of the Vienna Convention would suggest that as article 19 deals with the elementary question of admissibility and inadmissibility of reservations, article 20 deals with the bindingness of reservations on the confronted states. Theoretically a reservation which is inadmissible under article 19 cannot be accepted under article 20.²⁶ This is undoubtedly the case with directly or indirectly prohibited reservations. Only in unison may the parties make an exception to the general prohibition, as they unanimously may amend or abrogate the treaty. Article 19 does not treat the three instances of inadmissibility differently. Incompatible reservations are to be treated in the same manner as expressly prohibited reservations.²⁷ The structure of the two relevant articles would speak against applying the rule on tacit acceptance under article 20(5) to the test of compatibility stipulated under article 19(c) as well as prohibited under articles 19(a) and 19(b). The problem remains that the Vienna Convention does not provide any machinery for determining authoritatively the compatibility of a reservation. If the compatible character of a reservation is not bindingly affirmed the conditions would not be present to construe tacit acceptance automatically at the end of the 12-month period. If and when the reservation is established authoritatively as compatible the rules on acceptance would start to apply. If it is established as incompatible, the rules on acceptance would not apply.²⁸

Possibly paragraphs 2 and 3 of article 20 would speak for the application of identical rules for determining the compatibility of a reservation and for construing individual acceptance. With regard to restricted multilateral treaties reservations have to be accepted by all parties. Such acceptance may be tacit according to article 20(5). Together the parties are competent to undertake any measures regarding the treaty, such as termination, amendment, suspension as well as acceptance of reservations where the treaty is silent on the matter. If such a restricted multilateral treaty does contain an express (direct or indirect) prohibition of reservations, no tacit acceptance may be assumed. Derogation from express prohibitions against reservations may only be affected according to the procedures for amending the treaty.²⁹ Whether silence by the contracting states may be construed after 12 months as common acknowledgement of the compatibility of a reservation remains as doubtful as in the case of the standard multilateral treaties. Concerning organizational treaties, acceptance has to be express. It is clear that expressly prohibited reservations may not as such be accepted by the competent organ of the organization on the basis of the ordinary majority decision.³⁰ An exception could be permitted by unanimous decision or then the reservation clause could be changed according

to the procedure for the amendment of the treaty text. As concerns the compatibility test, it would appear that this decision is made according to the same procedure as the acceptance of an otherwise admissible reservation. In practice the question of compatibility and opposability are decided upon simultaneously and without distinction, by the same decision and according to the same procedure.

It can be argued that if passivity may be construed as an acceptance of the bindingness of a reservation it *a fortiori* may also be construed as an acquiescence in the compatibility of the reservation. If an admissible, therefore possible, reservation is objected to, it would seem even more natural to object to an incompatible reservation. Against such an *a fortiori* argumentation would speak the case of the various kinds of invalidity of contracts and treaties. In the case of absolute nullity, the invalidity operates *ipso facto*, the act is null and void and no reaction is needed from the parties involved to invoke this invalidity. In less grave cases invalidity will be relative. An act may only become invalidated on the specific demand of the party involved. In a similar way, a party may consider an incompatible reservation to be null and void, believing there to be no need to undertake an explicit act of renunciation.³¹

(2) Mainly for practical reasons it may be advocated that the rule of tacit acceptance ought to have a double function, both to determine the compatible nature of a reservation and to establish the opposability of the reservation. A look at the drafting history of the Vienna Convention may reveal if the negotiating states had reached a common understanding that the rule of tacit acceptance will also apply for establishing the compatibility of a reservation. Some of the drafts presented to the ILC make a distinction between the condition of compatibility and the question of acceptance and rejection of reservations. Article 19(a) of the 1965 revised draft by Waldock reads as follows:

"1. Where a treaty is silent on the question of reservations, reservations may be proposed provided that they are compatible with the object and purpose of the treaty. *In any such case* the acceptance or rejection of the reservation shall be determined by the rules in the following paragraphs,"³² (emphasis added)

The provisions of article 19(4) and 20(4) of the draft then proceed to regulate the acceptance and objection of reservations.³³ The wording of this draft appears to be clear as the expression "*In any such case . . .*" refers to compatible reservations in the case the treaty does not contain any reservation clause. The rules of acceptance and objection apply only once it has been established that a reservation is compatible and therefore admissible. At this stage of the drafting work some hopes were still nurtured for arriving at an agreed procedure for deciding bindingly on the compatibility of a reservation. On the other hand, there was opposition to the compatibility criterion, this was due either to a certain aversion to any kind of limitations to the presentation of reservations, or of a scepticism as to the possibility of settling in an objective way the compatibility question.³⁴ In an earlier draft the distinction between the determination of the admissibility and the opposability of a reservation was perhaps less clearly marked. Article 17(2) of this draft simply states that:

“2. (a) When formulating a reservation under the provisions of paragraph 1(a) of this article a State shall have regard to the compatibility of the reservation with the object and purpose of the treaty.”³⁵

The following paragraph (b) says, without making any exception as to the cited paragraph (a), that the effect of a formulated reservation shall be determined by reference to the provisions 18 and 19 regulating meticulously the acceptance of or objections to reservations.

Probably because of the failure to arrive at any authoritative procedure on deciding upon the compatibility of reservations, the Commission in its commentaries to the ILC draft stated that:

“The admissibility or otherwise of a reservation under paragraph (c) [i.e., incompatibility], on the other hand, is in every case very much a matter of appreciation of the acceptability of the reservation by the other contracting States; and this paragraph has, therefore, to be read in close conjunction with the provisions of article 17 regarding acceptance of and objection to reservations.”³⁶

It is not one hundred percent certain that this categorically means that the rule of tacit acceptance will apply to the compatibility test.

The efforts of the Conference to remedy the ambiguity of the provisions regarding the compatibility test were unsuccessful. Proposals were made both to the effect of making a clear distinction between the test of compatibility as a case of the absolute criterion of admissibility and the question of opposability governed by the rules of acceptance and objection, as well as to the effect of making the rules on acceptance and objection apply to the compatibility test. The Soviet Union, originally not in favour of the criterion of compatibility, made an initiative to combine the proposed articles 16 and 17 on admissibility respectively acceptance and objection into one single article. According to paragraph 1 of the proposed new article 16:³⁷

“1. A State may *make* reservations when signing, ratifying, accepting, approving or acceding to a treaty unless the reservation is incompatible with the object and purpose of the treaty. (emphasis added)

3. A reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of 6 months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.”³⁸

The compatibility requirement is given a less marked place in the Soviet amendment and it would seem easier to construe the rule of tacit acceptance in paragraph 3 not only to turn silence into acceptance of an otherwise compatible reservation but also to result in the acknowledgement of a reservation as compatible with the object and purpose of the treaty. Passivity results in acceptance of a reservation and implies its recognition as compatible.

The French amendment combining the rules on admissibility and acceptance of reservations in one common article does not make it clear whether the rule of tacit acceptance was to apply to the compatibility test:

"1. A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

- (a) The reservation is prohibited by the treaty;
- (b) The reservation is incompatible with the object and purpose of the treaty.

2. A reservation expressly authorized by the treaty cannot be the subject of an objection by other contracting States unless the treaty so provides.

3. A reservation to a bilateral treaty or to a restricted multilateral treaty must be accepted by all the contracting States.

4. In cases not falling under paragraphs 2 and 3, a reservation may be the subject of an objection by any other contracting State which has not accepted it. Nevertheless a reservation is considered to have been accepted by a State if it shall have raised no objection to it by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later."³⁹

The rule of tacit acceptance under paragraph 4 would seem to apply if the situations under paragraphs 1(a), 1(b), 2 and 3 are not present.

The joint proposal by Japan, the Philippines and the Republic of Korea clearly marked the separation between the rules regarding the admissibility comprising the rules on the determination of compatibility, and the rules regarding the acceptance of compatible reservations. While maintaining article 17 of the ILC encompassing the rule of tacit acceptance it would have introduced a collegiate system for determining the compatibility of a reservation. If the majority of the contracting states were to raise objections to a reservation, on the grounds that it was incompatible with the object and purpose of the treaty, within 12 months after it had been communicated to them it was to be without legal effect.⁴⁰ Beside this, every contracting state would also have kept an individual right to object on the grounds of incompatibility, a right that had to be exerted within a period of the same length.⁴¹

An amendment proposed by the United States was perhaps the most clear in stating that rules on acceptance under article 17 paragraphs 4 and 5 of the draft were not to apply to the norms on admissibility.⁴² The rules on acceptance, express and tacit, were not to apply where reservations were not permitted by virtue of draft article 16, either as directly or indirectly prohibited, or as incompatible.⁴³ With respect to this amendment the representative of Canada, Wershof, did ask the expert consultant to the Conference and the former rapporteur of the ILC, Waldock, during the first session of the Vienna Conference if the amendment of the United States was consistent with the intentions of the ILC.⁴⁴ The answer was in the affirmative.⁴⁵ This statement does not quite correspond with the view Waldock had presented in the ILC commentary to article 16 of the draft.⁴⁶ A Swiss amendment was only debarring the application of the rules on acceptance from applying to directly or indirectly prohibited reservations under article 16 subparagraph a and b, a proposal backed by the representative of Ethiopia.⁴⁷

The Vienna Conference was not able to decide on the question of whether the rule of tacit acceptance was to apply to the compatibility test or not. None of the amendments that would have brought clarity into the matter by pre-

senting a solution in one or other direction was adopted. The Drafting Committee to which the amendments had been referred, did not motivate its rejection of the amendments. The ambiguous wording of the Draft was thus maintained in the final text of the Convention. We have thus to recognize the fact that the Conference, bringing more than a hundred states together, did not agree on the question whether there should be a rule requiring or prohibiting the application of the rule of tacit acceptance to the compatibility test. We are here facing a case of a *normative gap*.⁴⁸ The view that the compatibility test is independent and separate from any rules of acceptance, and the contrary view that the rules of tacit acceptance are to be applied to the compatibility test, have been advocated, but both cannot be validly maintained at the same time. As neither of these two contentions achieved the necessary backing, the whole matter is left for a future solution.⁴⁹

The normative gap may be remedied in connection with some future dispute that is made the object of binding adjudication, or which leads to a generally accepted agreement between all the parties involved.⁵⁰

Reservation practice may possibly give some guidance as to the extent states react against reservations by officially declaring their view on incompatibility. However, in this matter practice will not provide much help. As will be shown later, confronted states have displayed strong disapproval of inopportune reservations using varying expressions and formulations. To these qualified objections they have attached diverse consequences, from no legal effects at all to the complete denial of any relations under the treaty.⁵¹ Usually however, the objecting states do not clarify at all what effects their qualified objections are to have. This creates doubts as to whether the objecting states actually consider the relevant reservations to be incompatible according to the provisions of the Vienna Convention. In fact, it has not happened that a confronted state opposing a reservation it considers incompatible openly admitted that this was done to avoid the implications of the rule of tacit acceptance. It cannot be proved that reactions and inaction by confronted states occur on the basis of a recognized obligation to count inaction during a certain period as tacit acceptance. The element of *opinio juris sive necessitatis* is not present for proving the existence of a customary norm which would help to fill the gap in the Vienna Convention.⁵²

If a contracting state does not act on the compatibility of a reservation it cannot be construed as an acceptance of the recognition of the reservation in accordance with the rule of automatic tacit acceptance under article 20(5). However, this will be no hindrance to proving that a contracting state by its actions or non-actions in certain situations has acknowledged the reservation to be compatible according to the general rules of acquiescence. Plain reference to silence at the moment of consenting or within the 12-month period will as such not be sufficient. In practice this hardly leads to problems in the instant cases. Confronted states certainly do not promote a reserving state to prevail in the belief that the reservation is compatible and opposable with respect to them.

16.3 EXPRESSLY AUTHORIZED RESERVATIONS

The Vienna Convention in its article 20(1) does away with the need of acceptance where the treaty permits a reservation:

“A reservation *expressly authorized* by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.” (emphasis added)

The ILC Draft went even further in circumscribing the liberty of acceptance and objection. Not only expressly but also “impliedly” authorized reservations would not require any subsequent acceptance. If for example a treaty prohibited reservations to certain articles of the treaty, they were impliedly permitted to the other parts of the treaty. The majority of the participants in the Vienna Conference were not ready to go this far and abstain from the freedom of action with respect to reservations which were only admitted by means of implication. The amendments of Switzerland, France and Tunisia as well as of Thailand were adopted with a clear majority of 55 votes to 18, with 12 abstentions.⁵³ The Vienna Convention certainly holds “impliedly authorized reservations” to be admissible but does not go as far as to consider them automatically opposable to be confronted states.

It is less clear if “expressly authorized reservations” become operative and opposable on the date of formulation or entry into force of the treaty irrespective of any subsequent acceptance and in spite of any objection.⁵⁴ There is no doubt that the expression “express authorization” is imprecise and comprises authorizations of various kinds. A treaty expressly authorizes reservations when it states in its text to which parts of the treaty reservations may be pending, or indicates the content of the reservations that are permitted. The express authorization may be general or specified.

16.3.1 Generally authorized reservations

If a treaty explicitly in writing permits the presentation of unspecified reservations to a number of articles and/or paragraphs, they are generally authorized. Reservations that are then presented to these provisions are assumed to be compatible and therefore admissible.⁵⁵ But there is no good reason to consider that such reservations will become *ipso facto* opposable. It was pointed out during the preparatory work that general authorizations will not help to foresee the various reservations that may be initiated and that the confronted states therefore have a legitimate interest in having their liberty to accept or reject these reservations.⁵⁶ Also reservation practice does show that reservations admitted on the basis of a general authorization have met with objections. In these cases the right to object has not been questioned. Thus, for example, the objections by 11 states to reservations concerning the Continental Shelf Convention were registered and taken notice of without any opposition.⁵⁷

16.3.2 Specifically authorized reservations

If a reservation clause indicates the exact content of an admissible reservation we have specifically authorized reservations. Any state which enters into the relevant treaty will know precisely which kind of reservations it may face in the future. Where the contents of authorized reservations are fixed beforehand, acceptance can reasonably be construed as having been given in advance, at the moment of consenting to the treaty. The standard type of specifically authorized reservation is present when the treaty permits that some of its provisions may be 'excluded' meaning that an obligation may be exchanged for a liberty. Article 20 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws permits the 'exclusion' of, *inter alia*, article 17 concerning the case of adoption:

"If the law of a State recognizes that its nationality may be lost as the result of adoption, this loss shall be conditional upon the acquisition by the person adopted of the nationality of the person by whom he is adopted, under the law of the State of which the latter is a national relating to the effect of adoption upon nationality."

The 'exclusion' of this provision by means of a reservation will have the effect of providing the reserving state with the liberty to consider an adopted person as having lost its nationality irrespective of whether this person has acquired the nationality of the adopting person or not.

Specified reservations may also be collected in an annex to the treaty. The 1959 European Convention on Compulsory Insurance Against Civil Liability in Respect of Motor Vehicles has an annex authorizing 16 specified reservations.⁵⁸ The treaty itself may contain a reservation clause regulating the formulation and operation of the reservations listed in the annex. Article 38 of the 1964 European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders indicates the occasions when the reservations mentioned in the annex may be formulated, the effects of these reservations and the conditions for their withdrawal.⁵⁹ Within the Council of Europe it is a common practice to establish the text of the only permissible reservations, so-called 'negotiated' reservations, when elaborating and adopting a convention or an agreement.⁶⁰

16.3.3 The case of optional commitments

Optional commitments ought to be distinguished from authorized reservations, although they in many respects resemble such reservations. A treaty may in itself provide the possibility for participating states to choose between different commitments varying in scope and content. It is less the case of a derogation from one norm denying the existence of an obligation, than a choice between two or more sets of obligations.⁶¹

The 1961 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations provides for three options to accept the obligation to grant national treatment to producers of phonograms on the basis of a) the criterion of nationality, fixation or publica-

tion, b) the criterion of nationality or fixation and c) the criterion of nationality or publication.⁶² Article 39 of the Revised General Act for the Pacific Settlement of International Disputes gives acceding states the option to accept all provisions, i.e., provisions concerning conciliation (chapter I), judicial settlement (chapter II), arbitration (chapter III) and the general provisions dealing with these procedures (chapter IV), or the provisions concerning conciliation and judicial settlement plus the general provisions dealing with these procedures or the provisions on conciliation only together with the general provisions concerning this procedure. Here the options are between a decreasing scope of obligations. These three different sets of obligations are equally legitimate under the treaty. The possibility of a choice is a crucial feature of the treaty itself.

Within the Council of Europe there is also a system requiring the contracting states to accept at least a certain number of the articles of a European convention. A state accepting to be bound only by the absolute minimum amount of articles may successively accept further articles. This is a procedure laid down by article 20 of the 1961 European Social Charter.⁶³ The option may also be between alternative parts of the treaty, where only one of two sets of undertakings can be chosen. Such is the case with the 1949 Revised ILO Convention concerning Fee-Charging Employment Agencies (96). Article 2 of this convention requires that a state when ratifying the treaty shall indicate if it accepts the provisions of part II, providing for the progressive abolition of fee-charging employment agencies, or the provisions of part III, providing for the regulation of fee-charging employment agencies. A state having accepted part III may later notify the Director-General of the ILO that it accepts part II. From the moment the provisions of part II become binding on that state, the provisions of part III cease to be applicable.⁶⁴

Treaties providing for optional commitments may be distinguished from authorization of reservations where obligations may be replaced by alternative obligations, but these will shade over into reservations where obligations may be replaced by more restricted obligations as is the case with the Revised General Act. Normally the distinction between treaties presenting optional obligations and treaties authorizing specific reservations will not be felt. In neither case will an objection be permitted under the treaty and the reciprocity of obligations will operate in the same way in both cases.⁶⁵

CHAPTER 17

OBJECTIONS TO RESERVATIONS

17.1 OBJECTIONS AS A SPECIFIC KIND OF STATEMENT OF DISAPPROVAL

As indicated in chapter XI statements that are made at the time of giving consent to be bound by a treaty may be of the most varying kinds. Only some of these statements are proper reservations according to the definition of the Vienna Convention. Any such statement may be reacted upon in a negative way. Where a confronted state expresses its disagreement with a proper reservation, we may speak of a formal objection governed by articles 20 to 23 of the Vienna Convention. Such a reaction will henceforth simply be called an "objection". However, where a statement is expressing a declaration of interpretation, the expression of disagreement will be called a "protest". Declarations and protests are not governed by the reservation regime of the Vienna Convention. Where we do not want to prejudice the nature of a statement, any expression of disagreement will be called a "disapproval".¹

Where a statement is unequivocally a reservation a confronted state may desire to express its dislike of the reservation without the wish to make a formal objection that will have the effects indicated by article 21 of the Vienna Convention. These formal, written reactions are not objections but more like simple protests as they are not intended to have the legal effects of proper objections.²

There may be no reaction to reservations and declarations. This inaction may be explained by the fact that the confronted states are dispassionate about them and do not consider them to jeopardize their own interests. Or that a confronted state is unable to foresee the effects of such statements and refrains from expressing its disapproval as it has no specific reason for so doing. A state may also abstain from communicating its opposition even in a case where it clearly dislikes a statement. Such inaction may be due to a wish not to endanger relations with the reserving state.³ The confronted state may also have come to the insight that no formally expressed disapproval is going to safeguard it from the possible undesirable effects of a statement. Mostly statements are not reacted upon by the confronted states, but the motives behind such inaction are usually not easily ascertainable.

The Secretary-General of the United Nations lists all formal statements made on signing, ratifying, accepting, approving or acceding to a treaty under the common heading "Declarations and Reservations" without undertaking any classification of the individual statements.⁴ All written reactions to statements are gathered under the common heading "Objections" without distinction, although not all of them would qualify for formal objections according to the terms of the Vienna Convention. Thus we will find under the same heading of "Objections" also protests against declarations of interpretation, of policy, and of non-recognition.

Israel has frequently responded to declarations of non-recognition from Arab states by using a standard protest. The Secretary-General has registered 76 declarations concerning non-recognition of Israel. Of these 60 have been met with formal protest from Israel.⁵ Kuwait made the following statement designated as an "understanding" to the 1976 Convention on the Prohibition of Military and other Hostile Use of Environmental Modification Techniques:

"It is understood that accession to the Convention on the Prohibition of Military and other Hostile Use of Environmental Modification Techniques done in Geneva, 1977, does not in any way mean recognition of Israel by the State of Kuwait. Furthermore no treaty relation will arise between the State of Kuwait and Israel."⁶

On 23 June 1980 an Israeli communication was received by the Secretary-General with the following standard formulation:

"The Government of Israel has noted the political character of the statement made by the Government of Kuwait. In the view of the Government of Israel, this Convention is not the place for making such political pronouncements. Moreover the said declaration cannot in any way effect whatever obligations are binding on Kuwait, under general international law or under particular conventions. Insofar as concerns the substance of the matter, the Government of Israel will adopt towards the Government of Kuwait an attitude of complete reciprocity."⁷

Though this formal protest would not be an objection under the terms of the Vienna Convention it has been worded to have certain legal effects. Insofar as Kuwait would derogate from prohibitions and obligations under the convention with regard to a possible armed conflict with Israel, the Israeli government would consider itself not bound by these norms. This formal protest does not introduce any new effects distinct from those that would anyway be the result of a derogation from the norms of the convention. Non-application of the norms of the convention, be it legitimate or illegitimate, may free the other states from the application of these norms with regard to the derogating state.⁸

Similarly, declarations concerning the status of the People's Republic of China, the Republic of Korea and the European Economic Community (EEC), where this community has been provided the opportunity to participate in a treaty, have been met with formal protests. Declarations concerning the status of organizations of economic integration are of a relatively recent date. Thus for example the Soviet Union stated in connection with its acceptance of the 1979 Natural Rubber Agreement and the 1980 International Cocoa Agreement that these treaties would not give rise to any obligations on its behalf in relation to the European Economic Community in the event the community becomes a party to these agreements.⁹ In both cases the EEC together with certain member states of the community disapproved of these statements. It appears that the EEC was not quite sure how to classify the statement. On the one hand the EEC pointed out that article 68 of the Natural Rubber Agreement and article 67 of the Cocoa Agreement prohibit any reservations to the agreements.¹⁰ On the other hand the statements of the Soviet Union were consistently designated as "declarations" by the EEC.¹¹

17.2 FORMAL REQUIREMENTS FOR MAKING OBJECTIONS

Just as the formulation of reservations has to fulfil certain formal requirements in order to achieve legal effects so does the making of objections. According to article 23(1) of the Vienna Convention an objection shall be formulated in writing and communicated to the contracting states and the states entitled to become parties to the treaty.

In contradistinction to reservations, which when formulated on signature have to be reiterated on ratification, objections need not be confirmed.¹² Article 23(3) of the Vienna Convention which concerns the question of confirmation of objections is somewhat ambiguous. The provision does away with the duty to confirm an objection which has been made to a reservation formulated on signature in the case where the reservation is confirmed on ratification after the moment the objection has been presented. An objection "made previously to the confirmation of the relevant reservation does not in itself require confirmation". The provision does not state anything about the case where an objection has been presented on signature by a confronted state. Does such an objecting state have to confirm its prior objection when it finally ratifies the convention?¹³

There are various circumstances which speak against the assumption that confirmation is required in the latter case. If confirmation would be the rule in this case it would have been expressly stated in article 23. Furthermore, one has to remember that the reasons for requiring confirmation of reservations entered on signature was a certain concession to the propagators of the principle of integrity of treaties. This argument is certainly irrelevant with regard to objections.¹⁴ In the advisory opinion of the ICJ in the *Reservations to the Genocide Convention* case the Court did touch upon the question of confirmation of objections when considering the right of signatories to object. The Court did not assume that objections on signature have to be confirmed on ratification, because it was of the view that an objection by a signing state became effective at the moment this state gave its final consent. The Court stated that,

"Pending ratification, the provisional status created by signature confers upon the signatory a right to formulate as a precautionary measure objections which have themselves a provisional character. These would disappear if the signature was not followed by ratification, or they would become effective on ratification".

Further it declared that,

"The reserving state would be given notice that as soon as the constitutional or other processes, which cause the lapse of time before ratification, have been completed, it would be confronted with a valid objection which carries full legal effect ...".¹⁵

17.3 STATES ENTITLED TO OBJECT

The question as to which states were allowed to take position on reservations by their express acceptance or objections was of crucial importance during the

era of the unanimity rule.¹⁶ Since one single objection had the effect of debaring a reserving state from participation in a treaty, the depositary had to determine which states were entitled to object. This was thoroughly discussed within the ILC as long as the unanimity rule was still supported by the majority of the members of the ILC.¹⁷ As already propounded in the Harvard Draft and energetically advocated by the British member to the ILC such a right should be conferred to all states having a possible interest in the treaty.¹⁸ States which participated in the negotiations and signed the treaty would have the right to object, as also would states that were invited to accede to the treaty. The opposite view was to give the right of objection only to those states which gave proof of their earnest wish to become a party to the treaty by ratifying the treaty or otherwise giving their definitive consent to be bound by it. The Secretary-General of the United Nations had favoured the latter view when fulfilling his functions as depositary. Where the treaty had already entered into force at the moment the reservation was pending the Secretary-General did consult all the states having ratified or acceded "up to the date the reservation was offered".¹⁹ In the case where the treaty had not yet entered into force, all those states that had ratified or acceded by the entry into force, were authorized to object. The Secretary-General would not accept for deposit any instruments of ratification or accession before the express or implied consent of these states had been established. This practice is also reflected in a number of treaties from the early times of the United Nations.²⁰

Both views were criticized. The first because it conferred the right of objection to a too wide group of states. Many of these states would perhaps never ratify the treaty.²¹ A reserving state might theoretically be hindered from becoming a party due to the objection from a state remaining outside the treaty. The second view was criticized because it restricted too much the category of states enjoying the right of objection. Some treaties required the ratification of only a limited number of states in order to enter into force. Thus a few states, being the first parties to the treaty, would have the power to settle in a definite way the fate of a reservation, making it opposable to all states entering later into the treaty. The standard example was provided by the 1949 Geneva Red Cross Conventions which entered into force after the second ratification.²² With regard to these treaties Switzerland was the first, and Yugoslavia the second state to ratify. These two states would have the power and competence to decide upon the fate of a reservation formulated by the third state ratifying.²³ They would also be free to make each others reservations become effective by mutually accepting them, making them withstand later objections.²⁴ Those signatory states which, due to constitutional procedures and the need to amend municipal laws, were not able to proceed immediately towards ratification were losing their right to make their views known as to the admissibility of a reservation.

Within the ILC some kind of compromise formula was proposed in line with the provisions of article 23 of the 1937 Convention for the Prevention and Punishment of Terrorism. The general rule was that the states which ratified or acceded to the treaty had the right to object to a reservation. However, where the reservation had been formulated within 3 years from the entry into force of the treaty, even the views of those states whose signatures had not yet

been followed by ratification had to be solicited. The clause did not require the signatories to give their final consent within a certain period.²⁵ A proposal presented by François intended to remedy this weakness by stipulating that a signatory not having ratified within 3 years from its signature would lose its right to object.²⁶

The problem of determining the group of states which have the right to object lost most of its relevance with the abandonment of the unanimity rule. The question so intensely discussed at the 1951 session was to be of only peripheral interest in connection with the proposals for a majority rule at the 1962 session and later during the Vienna Conference.²⁷ According to the flexible rule under the Vienna Convention a reserving state may not be debarred from participation in the treaty by a single objection except in the case of restricted multilateral treaties under article 20(2). Exclusion from participation would only occur in the hypothetical case where all the contracting states would object to the reservation and all these objections would further be qualified, meaning that all treaty relations with the reserving state are expressly excluded. Also with regard to those treaties which enter into force with a limited number of ratifications and where the chances that all objections are qualified will be greater, a possible exclusion from participation in the treaty remains only latent.²⁸ Other states later consenting to the treaty without any objections, or only with simple objections, will render the reserving state a party to the treaty.²⁹

In accordance with the advisory opinion of the ICJ in the *Reservations to the Genocide* case, states which made objections on signature have to take the definitive step of giving their final consent to the treaty in order to bestow on their objections legal relevancy. In those cases where a treaty provides a majority procedure for admitting reservations, it may be connected with an obligation for an objecting signatory to pursue the final ratification of the treaty within a certain period.³⁰

17.4 TEMPORAL CONDITIONS FOR MAKING OBJECTIONS

It has been felt necessary to set out a definite period within which an objection has to be made in order to minimize the uncertainty in determining the legal relationships between the reserving state and the confronted states. Where a confronted state has remained inactive during a certain period from the date it has received information of the reservation, it will according to the reservation regime under the Vienna Convention be construed as a tacit acceptance of the reservation. According to article 20(5) inaction by a confronted state results in an acceptance of the reservation after 12 months from the day notification of the reservation has been received. During the era of the unanimity rule there was no specific period generally agreed upon. When a reservation clause of the treaty did not set out a time limit, the depositary would urge the confronted states to expound their views within a "reasonable time".³¹

The rule of 12 months was not evident. During the drafting of the Vienna Convention proposals had been made to limit the time for objections to 3, 6 and 12 months.³² Each of these periods had been adopted in reservation

clauses.³³ A period of 6 months was quite common in conventions elaborated under the auspices of the League of Nations. This was for example the case in the 1928 Convention on Economic Statistics (article 17), the 1929 Convention on the Suppression of Counterfeiting Currency (article 22), the 1937 Convention for the Prevention and Punishment of Terrorism (article 23) and the 1939 Convention Concerning Exemption from Taxation for Liquid Fuel and Lubricants Used in Air Traffic (article 9).³⁴ A period of 90 days was common with regard to treaties that had been adopted during the first years of the United Nations.³⁵ Such is the case with the 1950 Convention on the Declaration of Death of Missing Persons (article 19), the 1952 Convention to Facilitate the Importation of Commercial Samples and Advertising Material (article 20(3)), the 1953 Convention on Political Rights for Women (article VII) and the 1957 Convention on the Nationality of Married Women (article 8). Within the ILC the reports of both Lauterpacht and Fitzmaurice maintained the 3-month rule.³⁶ Waldock in his first report on the law of treaties prolonged the period to 12 months.³⁷ The period of 12 months had already been propagated by the Inter-American Council of Jurists in resolution X adopted at its 4th meeting in 1959.³⁸ It was formally confirmed by the General Assembly of the OAS in resolution 102 of 14 April 1973. The final choice within the ILC for the longest of the three proposed periods is justified in order to allow the confronted states sufficient time to evaluate the legal effects of a reservation and opt for the most appropriate measures.³⁹

Article 20(5) of the Vienna Convention stipulates that where a state ratifies or accedes to a treaty without reacting on reservations that have already been formulated by another state, this will amount to a tacit acceptance of the said reservations. In the case where reservations are formulated after the date the confronted state had given its final consent to the treaty, this state will profit from the period of 12 months as from the date it received knowledge of the reservation. The depositary has the duty to inform the parties and the states entitled to become parties of all acts, notifications and communications relating to a treaty. A state entering a treaty is thus presumed to have knowledge of previous reservations and to have analyzed them as to their possible effects. In the case where a state ratifies a treaty shortly after the reservation has been notified it will not be put in a worse position than states having already given their consent to the treaty. In any case, a confronted state will have a period not shorter than 12 months to evaluate the consequences of a reservation.⁴⁰ This means that if a reservation has been notified more than 12 months before the date the state gives its consent to the treaty, the tacit acceptance is construed as having occurred on that same day. If the notification of the reservation has been received less than 12 months before its ratification or accession, the tacit acceptance is construed as having occurred not as on the date of giving final consent to the treaty, but after the lapse of 12 months from the day it received notification of the reservation. A reserving state will have to wait more than 12 months before being certain of the reactions of the other states. The transmission of the reservation to the depositary and further to the confronted states, and the transmission of formal reactions back to the depositary and the reserving state will take some time. It has also been pointed out that in practice there may be certain difficulties in determining the exact date when a con-

fronted state has received knowledge of a reservation.⁴¹

In the 1962 draft of the ILC the period was counted without distinction from the date a confronted state had received knowledge of the reservation.⁴² This provision had to be changed, because it was felt unjustified that a state would have to react before it had itself consented to the treaty.⁴³ Treaties themselves may provide for a different procedure indicating that the period for objecting is to be counted from the date the depositary receives the instrument of ratification accompanied with the reservation for deposit.⁴⁴

When a reservation is presented at the moment of signature a confronted state may naturally object at this occasion though there is no need for it to do so. The period of 12 months will only start to run from the date information has been received from the depositary confirming ratification.⁴⁵ Objections to a reservation entered into upon signature may become irrelevant if the reservation is not reiterated on ratification. On the other hand, objections pending on signature may, when numerous, compel the reserving state to abandon its reservation on ratification.⁴⁶

Some proposals were made to limit the right of objections by making this right subject to the compatibility test. Objections were only to be allowed in the case where the reservation was believed to be incompatible with the aim and purpose of the treaty. If this was not the case the objection would be of no effect.⁴⁷ However, the view urging for a wide freedom in making objections prevailed.⁴⁸ The right of objection was to be kept distinct from the criterion of compatibility. It is possible to object to compatible reservations.

CHAPTER 18

THE LEGAL EFFECTS OF ACCEPTED RESERVATIONS

An elaboration of the effects of reservations and objections on the operation of treaty norms requires as a rule the fragmentation of the treaty relations into bilateral relationships. Article 21 of the Vienna Convention distinguishes between three kinds of legal situations: a) relations between the confronted states *inter se*, b) relations between the reserving state and the accepting states, and c) the relations between the reserving state and the objecting states. According to the Vienna Convention these three relationships are affected differently by a reservation.

18.1 TREATY RELATIONS BETWEEN THE CONFRONTED STATES *INTER SE*

According to article 21(2) the relations among the confronted states remain unaffected by that reservation. Naturally this does not have to mean that the treaty has to operate unaffected between the confronted states. Some of them may have advanced their own reservations which will bring about a modification of the treaty relations of a different kind.

Article 21(1) does not make any exception with regard to the *restricted multilateral treaties* under article 20(2) and the *organizational treaties* under article 20(3). With regard to these treaties the acceptance of reservations is not left to individual appreciation, but does require unanimous acceptance by all parties or a majority decision by the competent organ of the organization in question, as for example the Council of the International Maritime Organization, the Assembly of the World Health Organization or the Customs Cooperation Council. In contradistinction to the ordinary treaties, a reservation to these treaties may not give rise to three different, parallel norm systems but only to two. A norm system unaffected by the reservation operating between the confronted states, and a norm system modified by the reservation operating between the reserving state and each of the confronted states.¹ With respect to restricted treaties all parties have approved of the modification, but in the case of the organizational treaties a state having voted against the acceptance of the reservation may see itself obliged to acquiesce in the reservation. There are though treaties which in their reservation clauses provide for a majority procedure for the acceptance of reservations and which nevertheless furnish a possibility for the opposing state not to consider itself bound by the reservation.² Where the confronted states are ready to accept a reservation but believe that the original rights and obligations cannot reasonably be maintained they may undertake a modification of the treaty relations between themselves. With respect to restricted treaties this appears easier than with respect to organizational treaties where the rules on amendment are to be followed. There is of

course a category of treaties which presents certain problems when dissecting the norm system into a set of bilateral relationships because the rights and obligations are closely intertwined. Where a reservation is accepted without explicitly agreeing to modify relations between the other states, such a change may nevertheless ensue from collective acceptance.³ Commodity agreements provide an example of treaties where separation of treaty relations is hardly feasible.⁴

18.2 THE OBLIGATIONS AND RIGHTS OF THE RESERVING STATE WITH RESPECT TO THE ACCEPTING STATES

Article 21(1)(a) of the Vienna Convention states that a reservation explicitly or tacitly accepted:

“... modifies for the reserving State in its relations with that other [i.e., accepting] party the provisions of the treaty to which the reservation relates to the extent of the reservation; ...”

In those cases where we have an ‘excluding reservation’ stating that a certain provision “is excluded”, “will not apply”, “will not be accepted”, “is not binding”, “is made the object of a reservation” or “will be subject to a reservation” the intention has as a rule been to replace an obligation for the reserving state, by a liberty from that obligation. By formulating an ‘excluding reservation’ to article 68 of the 1949 Geneva Convention on the Protection of Civilian Persons in Times of War (IV), the United Kingdom, Australia and Canada “reserved the right to impose the death penalty in accordance with the provisions of paragraph 2 of article 68 without regard to whether the offences referred to therein are punishable by death under the law of the occupied territory at the time the occupation begins”.⁵ The purpose of these reservations is to disengage from the duty not to impose the death penalty in occupied territories where this is not provided for by the local laws. A state having accepted the above-mentioned reservations has lost the right to claim a violation of the Geneva Convention in the case where the reserving state actually imposes the death penalty in an occupied territory.

In the case where a reservation is formulated to ‘exclude’ the claim-right of the other parties the outcome will be similar. Finland in a reservation to the 1963 Vienna Convention on Consular Relations denied the right of honorary consuls under articles 58(1) and 35(1) to employ diplomatic or consular couriers and bags. Finland thus wanted to obtain the liberty of action with respect to the employment of couriers and bags by denying a duty vis à vis the sending state.⁶

Similarly, ‘modifying reservations’, being usually of the restrictive kind, alter the scope and content of obligations for the reserving state and the scope and content of correlate rights for the accepting state.

Hungary restricted its obligations under the 1960 Convention Relating to the Unification of Certain Rules Concerning Collisions in Inland Navigation by declaring that the provisions of the convention shall not apply to vessels exclu-

sively employed by the public authorities.⁷

The Federal Republic of Germany on ratifying the 1971 Convention on Psychotropic Substances, freed itself from one obligation replacing it by another. Instead of requiring manufacturers, wholesale distributors, importers and exporters to keep records of the type described under article 11(2) they would be asked "to mark specifically those items in their invoices which contain substances and preparations in Schedule III".⁸

The Vienna Convention prescribes that an accepted reservation has the effect of modifying treaty relations between reserving and accepting state "to the extent of the reservation". What this expression is to mean was not really clarified during the preparatory work. At the Vienna Conference on the Law of Treaties the representative of the United States in the Drafting Committee of the Conference, Kearney, had to admit that the expression was puzzling.⁹ This comment was made in connection with the deliberations on the effect of objections to reservations, but the same obscurity also holds true for the provision on the legal effect of acceptance.¹⁰ The chairman of the Drafting Committee of the Conference, Yasseen, tried to clarify the expression used by providing the example of a reservation that was formulated to an article affecting only the first three paragraphs.¹¹ The reservation whether accepted or objected to left the other paragraphs still effective. This is a one-sidedly restrictive understanding of the wording in article 21 and it may reasonably be doubted if it is an exhaustive reading of this article.¹²

To the "extent of the reservation" means to the extent of the impact of the reservation. This may not only be limited to parts of the designated article but also extend to other articles of the treaty.¹³

We have a number of reservations to article 23 subsection D of the Convention on the Territorial Sea and the Contiguous Zone stipulating the conditions under which a coastal state may require a foreign warship in innocent passage to leave its territorial sea. The reservations reserved for the coastal state the right to demand prior authorization for any foreign warship to pass through the territorial sea. These reservations naturally had effects on the application of article 14 under subsection A containing rules applicable to all ships. This article introduces the notion of innocent passage, clarifying and exemplifying the contents of this right. Only Czechoslovakia and Hungary did on presenting their reservations to article 23 make an explicit reference to article 14.¹⁴

CHAPTER 19

THE PRINCIPLE OF RECIPROCITY AND ITS LIMITS

19.1 THE ORIGINS OF THE PRINCIPLE OF RECIPROCAL OPERATION OF RESERVATIONS

Once a reservation has become effective it may not only be invoked by the reserving state but also by all the other confronted states in their relations with the former.¹

The Vienna Convention stipulates this principle of reciprocity in article 21(1)(b):

“... modifies those provisions to the same extent for that other [i.e., accepting] party in its relations with the reserving State.”

The rule that reservations operate both ways had already been established in a number of judgements by prize courts of the Entente Powers during World War I. They all concerned disputes that arose from reservations formulated to the 1907 Hague Convention (VI) Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities. Germany had on signature formulated reservations ‘excluding’ articles 3 and 4(2), which were maintained on ratification.² Article 3 provides that enemy merchant ships which have left their last port of departure before the commencement of the war and are encountered on the high seas while still ignorant of the outbreak of hostilities cannot be confiscated. They may be liable for detention provided that they are restored after the war, there being no duty to pay compensation. In the case of requisition or destruction compensation has to be paid. These provisions were unacceptable to Germany and Russia, who believed them to establish inequality between the belligerents. States without naval stations in different parts of the world would probably have to destroy enemy merchant ships with the ensuing obligation to pay compensation, which would turn into a considerable financial burden. Powers such as Great Britain and France exerting at that time control over widely dispersed areas were considered to profit unjustly from articles 3 and 4.³

A commonly cited case where the reciprocal effect of reservations had been confirmed was the case of the *Marie Glaser*, a German merchant vessel, on which the British prize court passed its decision on 11 September 1914.⁴ The German claimant invoked article 3 of the VI Hague Convention. The prize court refused to consider Great Britain bound by that article with regard to any German claim due to the reservation formulated by Germany. A similar case decided upon by a British prize court was the *Perkeo* where the decision was passed on 11 November 1914.⁵ The French Conseil des prises decided along the same lines in the case of the *Porto*, the *Barmbeck*, the *Frieda Mahn*, the *Martha Bockhahn* and the *Czar Nicolai*.⁶ Pomme de Mirimonde questions the

correctness of these decisions. Not only were the obligations under articles 3 and 4 inapplicable between Germany and France respectively Great Britain, but the whole convention was inoperative due to the *si omnes* clause in article 6. Thus, for example, Serbia being one of the first states involved in World War I had not ratified the convention with the effect of divesting from it any legal force.⁷ Irrespective of this misjudgement of the courts, the reasoning of the prize courts with regard to the reciprocity effect has not been criticized.⁸

19.2 THE RECIPROCITY PRINCIPLE AS STATED IN RESERVATION CLAUSES

Express reference to the reciprocal operation of reservations is to be found already in treaties elaborated during the interwar period. Paragraph 6 of the Protocol to the 1923 Convention on the Simplification of Customs Formalities authorized a number of reservations that had been presented by some of the negotiating states to the League of Nations Customs Conference but frees the confronted states from the obligation to apply the relevant provisions as long as the reservations are maintained.⁹ Article 20 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws authorizes reservations to certain of its articles. Paragraph 2 states that a reserving state may not rely on the provisions excluded by a reservation against any other contracting party.¹⁰

In certain categories of treaties reservation clauses regularly uphold the reciprocal effect of reservations. Such is the case concerning the conventions of the Hague Conference on Private International Law, the conventions of the Council of Europe as well as the conventions elaborated by the Economic Commission for Europe (ECE) regulating customs matters and road traffic.¹¹ Explicit reference to the principle of reciprocity is further found in various treaties concerning procedures for the compulsory settlement of disputes. The 1928 General Act for the Pacific Settlement of International Disputes authorizes in its article 39 the exclusion of certain types of disputes from the disputes settlement procedure. Where such a reservation is presented the other parties may equally exclude the procedures to such disputes in their relations with the reserving state.¹² The Revised Act of 1949 has taken over these provisions from the 1928 Act. A similar rule of reciprocity is to be found in the 1928 General Treaty of Inter-American Arbitration.¹³ The same applies to the European Convention for the Peaceful Settlement of Disputes.¹⁴ The ICJ confirmed the principle of reciprocal operation of reservations as to the competence of the Court in the *Norwegian Loans* and the *Interhandel* cases.¹⁵ The reciprocity principle was equally asserted in the *Anglo-Iranian Oil Company* case.¹⁶ Earlier the PCIJ had affirmed it in the *Phosphates of Morocco* and the *Electricity Company of Sofia and Bulgaria* cases.¹⁷

The principle of reciprocity of reservations has been expressed in different ways. A reservation clause may state that other parties 'are not bound' by the norm expressed by the provision in their relations with the reserving state. This is the case with the 1923 Customs Formalities Convention. A reservation clause may also indicate that a confronted state may not be 'required to extend ...

the benefit of the [affected] provisions' to the reserving state. This is the formulation we find in the ECE conventions on customs matters, as for example in article 20(7) of the 1954 Convention Concerning Customs Formalities on Touring.¹⁸ Or the reservation clause may express the reciprocity principle from the viewpoint of the reserving state denying it the right to claim the application of the provision to which it has itself formulated the reservation.

At first glance there does not seem to be any difference in the substance of the above-mentioned formulations. They seem simply to state the effects of reciprocity either from the view of the reserving state by introducing a no-claim, or from the view of the confronted state conferring a liberty. This would be correct with respect to the contractual type of treaties operating mutually. However, with regard to treaties instituting absolute obligations, binding as such and unconditionally, only the last formulation would be rational. Participating states are not supposed to be released from these obligations in the case where another state presents a reservation.¹⁹

Where the reservation is of the 'excluding' kind, the reserving state may not claim the application of any part of the provision. If the reservation is only restricting the obligations under the provision, the reserving state may claim the application of the provision only to the extent it is itself bound by it. We find such wording in a number of reservation clauses to the European conventions.²⁰

Reservations will usually operate automatically on a reciprocal basis. Occasionally, however, this will not be the case. With regard to the Touring Convention of 1954 a confronted state wishing to avail itself of the benefit of the reservation "shall" notify the UN Secretary-General thereof, who in his turn has to inform the reserving state as well as the other signatories and contracting states of this notification (art. 20(7)). Such notice was given by the United States with regard to the Bulgarian, Romanian and Soviet reservations, by Yugoslavia with regard to the Soviet reservation, and by Portugal to the Tanzanian reservation.²¹

Sometimes a treaty will in general terms provide that the obligations and rights as such are to operate mutually. Article 18 of the 1956 Convention on the Recovery Abroad of Maintenance formulates the principle of reciprocity in the following way:

"A Contracting Party shall not be entitled to avail itself of this Convention against other Contracting Parties except to the extent that itself is bound by the Convention."²²

A similar formulation is to be found in article XIV of the 1958 Convention on the Enforcement of Arbitral Awards.²³ A more rudimentary formulation is to be found in the 1965 Convention on the Trade of Land-Locked States (article 15):

"The provisions of this treaty shall be applied on the basis of reciprocity."²⁴

This general reference to the principle of reciprocity is to emphasize that the burdens of obligations and the benefits of rights are distributed equally among

all the parties to the treaty. Whenever derogation from the original rules is permissible, and this faculty is availed of by one party, the other parties ought to profit from this derogation to the same extent in their relations to the first party. It is irrelevant if the derogation is due to an express authorization in a reservation clause, as is the case with regard to the two former treaties, or were no such authorization exists, as is the case with the last treaty.

Irrespective of the fact that the principle of reciprocity is not mentioned either in general terms or specifically in connection with the authorization of reservations, it will nevertheless constitute the basic principle which governs the operation of reservations. Such is the case even without any explicit reference to the principle we now find embedded in article 21 of the Vienna Convention.²⁵

19.3 LIMITATIONS TO THE PRINCIPLE OF RECIPROCITY

The provisions of the Vienna Convention on the reciprocal effect of reservations give the impression that the principle of reciprocity would be quite unproblematic. In article 21 we find the following formulation:

“1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:

- (a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and
- (b) modifies those provisions to the same extent for that other party in its relations with the reserving State.”

There was not much discussion on the reciprocity principle in the ILC or at the Conference.²⁶ Presumably the question was not believed to be of any complexity. Only occasionally was there a comment that the principle had certain limits.²⁷ In legal doctrine the rule of reciprocity has undergone a more thorough analysis.²⁸ It is evident that the principle of reciprocity is a rule with many exceptions. Firstly, the reciprocal effect of reservations presupposes the mutual operation of obligations and rights under the treaty. Where norms do not work on a mutual basis between the parties of a treaty the reciprocal effect of reservations is vitiated. Secondly, the reciprocal effect of reservations may be impracticable due to the terms of the reservation itself. The fact that the treaty as such would warrant reciprocity of reservations is without significance. Finally, reciprocity may not be feasible due to external circumstances, even though the terms of the treaty or the contents of the reservation would not exclude reciprocity.

19.3.1 Impracticability of reciprocity due to the nature of the treaty

19.3.1.1 *The case of one-sided and mutual treaties*

The basic problem is how one is to identify those treaties which do not allow for reciprocal operation of reservations. The basic assumption discussed ear-

lier, in chapter X, was that treaty norms such as norms of national law stand for express legal relationships. Legal norms were there construed as two-sided concepts where the right of one actor was correlated with an obligation for another actor. A norm may stand for such a single relationship imposing an obligation on one party and conferring the correlate right to another party. Such a norm is operating one-sidedly because it stands for an independent obligation (respective right) which is not conditional on any right for the obliged party having this obligation.²⁹ The obligation to pay reparations as other obligations under peace treaties is one-sided. However, a norm may signify more than just a single relationship, namely a compound relationship encompassing two or more inverted relationships. Rights and obligations work both ways, i.e., they are mutual. Bilateral treaties as a rule operate in this way, mutually. According to article 5 of the 1966 Agreement between Bulgaria and Syria concerning scientific and technical co-operation "... the Contracting Parties undertake not to disclose to individuals or bodies corporate of other countries ... the knowledge acquired in the course of scientific and technical co-operation".³⁰ Here the obligation of secrecy is mutual as is the right to claim that the other party is to comply with this obligation. Among the multilateral treaties we may cite article VII(5)(c) of the 1959 Antarctic Treaty which requires that: "... Each Contracting Party shall ... inform the other Contracting Parties ... of any military personnel or equipment intended to be introduced by it into Antarctica ..."³¹ Here the obligation of information is mutual.

Norms of general international law are commonly conceived as averring compound, mutually operating legal relationships. State A has a duty not to resort to armed aggression against state B and state B has the correlate claim-right towards state A not to undertake such an act against it. B has the identical duty towards A, and A the identical and correlate claim-right with respect to B. To take one example from particular international law, states A and B have both the obligation to recognize arbitral awards rendered in their respective territories and the correlate claim-right to claim that arbitral awards announced in their territories are to be recognized within the jurisdiction of the other.³²

Treaties being a conjunction of norms may either bring about single or mutual legal relationships or both. Where a treaty embraces only single legal relationships it may happen that the obligations are all concentrated to one party whereas all the rights are gathered with the other party or parties. Such treaties are more the exception than the rule. Peace treaties would possibly fall under this category as all obligations are likely to be imposed on the loosing state, and all the rights to be conferred on the victorious state or states. However, even peace treaties may accord a limited number of rights to the looser state. Article 13 of the 1947 Peace Treaty between Finland and the USSR, the United Kingdom, Australia, the Beylorussian SSR, Canada, Czechoslovakia, India, New Zealand, the Ukrainian SSR and the Union of South Africa, obliges Finland not to have a land army exceeding a total strength of 34,400 men, there is also a right to claim that the land army may be kept up to that strength.³³ Treaties where all obligations are concentrated to one party, and thus operate in one direction, must be seen as the result of

a dictate. Normally, all parties acquire both rights and obligations. No state would enter a treaty without getting some benefit out of it. As each negotiating state pursues interests which may encroach on the interests of the other states, concessions will have to be made assuming some obligations in order to acquire certain desired rights. The final treaty text is the result of bargaining and as such is supposed to stand for a balanced distribution of both rights and obligations among the parties.³⁴ It does happen that a state party considers that a balance has not been achieved as is the case for example with *unequal treaties*. However, disputes as to such treaties do not arise from the fact that all obligations are concentrated to one party, but out of the belief that the distribution of rights and obligations is unjust. An obligation for one state is conditioned by an identical or different obligation for the other states and this concerns also the distribution of rights. Mutuality of rights and obligations is the natural result of states advocating their own interests while recognizing at the same time the interests of the other negotiating states as legitimate. The rule is that treaties provide mutual commitments, rights and obligations do operate both ways, reciprocating each other.

Reciprocity within the norm system of treaties may consist of the bestowing of either identical or equivalent rights and obligations on each other. Reciprocity with regard to the operation of treaty norms is thus an ambiguous concept. The case of *identical reciprocity* is at hand where state A has the obligation to perform act X towards state B, and B the obligation to perform act X towards state A. We may find identical treaty relations, for example, in treaties regulating diplomatic or consular matters between states. The obligation of the Norwegian government not to impose taxes on Pakistani diplomatic agents corresponds to the duty of the Pakistani government not to impose such taxes on Norwegian diplomatic agents.³⁵ Fitzmaurice mentions another example were identical favours are granted on the condition of reciprocity.³⁶ Article III of the General Agreement on Tariffs and Trade states that "... contracting parties recognize that internal taxes ... should not be applied to imported ... products so as to afford protection to domestic production".³⁷ The norm could be formulated to read: No contracting party shall apply internal taxes to imported goods from any other party. This norm formulation may be further specified: Contracting state A shall not apply internal taxes to imported goods from contracting state B, and contracting state B shall not apply internal taxes to imported goods from contracting state A.

An *equivalently reciprocal* treaty norm is at hand where state A has the obligation to perform act X towards another state B, and B has the obligation to perform a different act Y towards A. Acts X and Y are as such, or in combination with a set of other obligations, considered to be equal in value. Equivalently reciprocal obligations are usually expressed in separate provisions and it may well be contended that we actually are dealing with two separate though, interdependent, norms. One norm is conditioning the other.³⁸

Equivalent reciprocity is encountered in treaties having more the character of contracts, such as commercial, financial and technical agreements. Treaties concerning leases of territories also belong to this category. So the Soviet Union, for example, has the duty according to the 1962 Saima Canal Agreement with Finland to hand over the canal, together with a strip of land ave-

raging 30 meters but extending to 200 meters at certain places (locks, bridges and similar constructions), plus certain port facilities on Malyi Vysotskii Island, and Finland has the correlate right to claim the utilization of the canal.³⁹ Finland has the interdependent and equivalent duty to pay an annual rental determined on the actual freight turnover with the complementary obligation to pay compensation of 960,000 roubles for certain material expenditure and loss incurred by the Soviet Union.⁴⁰ Similar examples may be taken from multilateral treaties.

Where a treaty is one-sided in character consisting only of norms introducing single legal relationships working to the benefit of one or some of the parties only, there are no mutual relationships on which the reciprocal operation of reservations could "bite", to use an expression of Fitzmaurice.⁴¹ If a party which is supposed to carry out the one-sided obligations of, let us say, a peace treaty presents a reservation initiated by its parliament, the confronted state or states will find the sphere of their rights restricted without being able to reciprocate. The confronted states could of course condemn the effort to diminish the scope of obligations and press the reserving state to abandon its reservation. In this case, they could also accept the reservation and submit to a situation where their rights are curbed one-sidedly. This is of course a hypothetical case and the occurrence of reservations is not very probable in connection with peace treaties.⁴²

Where treaties create mutual rights and obligations for each of the contracting parties, the prerequisites would seem to be at hand for allowing a reciprocal operation of reservations. This is undoubtedly the case with treaties introducing identically reciprocal obligations and rights. An illuminating example is provided by the reservations presented to article 37(2) of the 1961 Vienna Convention on Diplomatic Relations. Article 1(c) of the convention makes a distinction between the diplomatic, the administrative and technical, as well as, the service staff in diplomatic missions. According to article 37(2) the administrative and technical staff shall enjoy the privileges and immunities assigned to the diplomatic agents as specified in articles 29 to 35, except that immunity from civil and administrative jurisdiction does not extend to acts performed outside the course of their duties.⁴³ Various states such as Egypt, Morocco and Portugal were not ready to guarantee such privileges and immunities to the administrative and technical personnel.⁴⁴ In this case the reservation would work to the benefit of the reserving and accepting state alike.⁴⁵ The accepting state is at liberty to deny the administrative and technical staff in the mission of the reserving state the benefits enumerated in article 37(2). Correspondingly the reserving state loses its right to claim for its administrative and technical personnel the same benefits under article 37(2). The reciprocity effect may perhaps not trouble the reserving state if it does not have the possibility to maintain large diplomatic missions abroad. This may have been the case with the cited reservations, the three reserving states not being major powers having the means to maintain large missions. However, in the case where a reserving state experiences the reciprocal effect of its reservation as detrimental it may always withdraw the reservation.⁴⁶

The Conventions on the Privileges and the Immunities of the UN respectively the Specialized Agencies have a more complex character as they do not really

operate on a mutual basis between the states parties to the conventions but invest rights in separate legal entities, the international organizations.⁴⁷ Restricting the rights of officials and experts of the organization may not affect the position of another party but circumscribes the legal position of the organization which has not the possibility to reciprocate. It is highly questionable if a contracting state, for example restricting the rights of the representatives of other states to the organization by means of a reservation, will make it possible for the other states to restrict similarly the rights of the representatives of the reserving state.⁴⁸ The obligations are assumed not only with regard to the other parties but also to the international organization. On many occasions the competent organ of the international organization has not been willing to approve of reservations.⁴⁹ Other examples of treaties creating identically reciprocal rights and obligations than the conventions on diplomatic and consular relations are treaties on investment, establishment or visas.⁵⁰

With regard to treaties establishing equivalently reciprocal rights and obligations the principle of reciprocal operation of reservations will encounter certain difficulties. The wording of article 21(1) does not speak in favour of an automatically applicable reciprocity of reservations. An accepted reservation "modifies *those* provisions for that other party in its relations with the reserving State." (emphasis added).⁵¹ The obligation that could be said to be equivalent to the obligation excluded or restricted by the reservation is usually not embraced by the same provision. A system of treaty norms providing for mutual but not identical obligations and rights is assumed to be a balanced whole. If a reservation is introduced into the norm system in order to restrict the obligations of the reserving state the balance is upset and difficulties arise as to determining if and to what extent, the obligations of the confronted states may be diminished. If a reservation to such a treaty is permitted, the just reduction of the interdependent obligations of the other parties has to be settled by common agreement. It is hardly possible to reduce automatically the obligations of the other parties according to some pre-existent objective scheme. When we have a situation where a reservation is followed by an agreement indicating in what way the equivalent obligations of the other parties are to be modified, we end up with a genuine amendment of the treaty. Commodity agreements are treaties providing for equivalently reciprocal obligations for the parties, the importing members on one side and the exporting members on the other side. As here only the sum of obligations of the importing members is considered as equivalent to the sum of obligations of the exporting members, a possible reservation by let us say an importing member will make it difficult if not altogether impossible to establish the extent to which the obligations of the exporting members may be modified. Furthermore, how is the position of the other importing members affected? In the light of these difficulties and dangers a number of commodity agreements do categorically forbid any kind of reservations. Such is the case with the 1968 International Coffee Agreement and the 1972 International Cocoa Agreement.⁵² Other commodity agreements permit reservations under clearly stated conditions. Article 65 of the 1968 International Sugar Agreement permits reservations under three conditions. Reservations previously formulated to the 1958 Sugar Agreement may also be presented to the 1968 Agreement. Other reservations were permissible provided

that they do not affect the economic functioning of the agreement.⁵³ Thirdly, reservations not fulfilling the above-mentioned conditions could be admitted if the Sugar Council by special vote so decided. The Council may equally determine under what conditions they are to be accepted.⁵⁴

19.3.1.2 *Treaties introducing 'absolute' obligations*

Whereas the former categories could be said to operate between state parties in their relations *inter se* there is an increasing body of treaties which create obligations *per se* in order to accomodate some common goal which transcends the particular and mutual interests of the individual parties. These treaties have been denominated in various ways; normative, law-making, social, legislative, etc.⁵⁵

The choice of these terms is unhappy as they have also been used to designate treaties which establish general rules of international law operating just like contractual commitments on a mutual basis. The conventions on diplomatic and consular relations are usually classified as law-making treaties. Perhaps the expression *transcending treaties* is more fitting, the obligations operate above or beyond the sphere of interstate relations.

With regard to these transcending treaties it would seem as if the concept of norms as introducing correlate rights and obligations is not entirely satisfactory. Hohfeld's idea that the concept of norms as jural relationships provides a comprehensive explanation of what rights and obligations are about has been criticized. McCormick, for example, asserts that the conception of law as consisting of 'atomic relationships' gives a too simple picture of how legal norms operate.⁵⁶ McCormick elucidates his point with examples from Scottish and English legislation, however, international law equally provides a manifold of examples where obligations and rights are not easily conceived of as correlate and mutual relationships. Treaties not directly regulating mutual relations and transactions qualifying as 'transcending treaties' are those which guarantee human rights or objective regimes.

Nevertheless it must be admitted that transcending treaties are the result of laborious construction where the negotiating states are pursuing opposing and sometimes irreconcilable interests. No normative treaty may be said to provide just the technical means and modes to realize some clear and undisputed aim. These treaties create obligations without usually providing any rights. However, states are ready to assume the burden on the condition that other states do, out of the belief that in the long run benefits will follow from it. The obligations of these treaties may be felt burdensome by the individual parties in different ways. States may also to varying degrees be eager to make concessions for the realization of a common aim.

a. **Human rights treaties**

Under the terms of treaties on human rights the state parties assume obligations vis à vis all individuals living in their territory, nationals as well as residents.⁵⁷ Human rights treaties have been designated as treaties binding states to "universal principles of justice" or to "absolute obligations towards trans-

cending and imperative international interest".⁵⁸ To put it in less ambitious terms these treaties intend to realize "identical" instead of "complementary" or even "opposite" interests.⁵⁹

The International Court of Justice stated in its advisory opinion of 1951 that in conventions like the Genocide Convention "... the contracting States do not have any interest of their own; they merely have, one and all, a common interest, namely the accomplishment of those high purposes, which are the *raison d'être* of the Convention".⁶⁰

Legal relationships may be instituted under such treaties, but they are to operate between the state party to the treaty and the individuals under its jurisdiction. For the individuals as beneficiaries of human rights to acquire a claim-right against the authorities of the state party, the norms of a treaty must as a rule be introduced into national legislation through transformation, if there is no support for the simpler procedure of adoption in the provisions of the constitution.⁶¹ The possible claim-rights of the individuals directly or indirectly acquired under the treaty are to be pursued through the local remedies of the respective home country. Where human rights have been recognized as being of utmost importance, they may transcend the sphere of intrastate relations. In such a case, the obligation to protect and pursue human rights are not only obligations towards the individual but also to the international community as such.⁶² Where the transcendent importance of human rights has been more widely recognized, the conditions may be present to confer on an international organ the competence to exert a certain control over the implementation of these rights. This is more likely to occur at a regional level where the chances are better for a body of coherent values to have developed. Within the framework of regional co-operation we may encounter procedures for the handling of claims by individuals, international organs, and other states concerning violations of human rights. Within the Western European co-operation we have the European Commission of Human Rights with the competence to receive petitions by individuals, and the European Court of Human Rights with the competence to consider cases brought before it by states being members of the European Community or by the Commission.⁶³ A parallel institution has been established within the framework of Inter-American co-operation where the Inter-American Commission on Human Rights may receive petitions by individuals or groups and the Inter-American Court of Human Rights may adjudicate claims by states or the Commission.⁶⁴ States members of these communities have the independent right to initiate legal proceedings against another member state in a case of human rights violation and may thus be said to act in the name of the community. The same may be said of the instances where the Human Rights Commissions submit a case to the respective Court. The individual has usually not been granted anything but a right of petition.

In spite of the possibility of bringing a violation of human rights up for investigation and adjudication it still does not affect the character of the original relationship. It remains a single relationship which operates nationally, internally between the state party and its subjects. It is because of this characteristic, being a single legal relationship and mostly operating on a national basis, that it is not easy to conceive how a reservation 'excluding' or restricting a human right could have any reciprocal effect.⁶⁵ The position of the indi-

vidual vis à vis the state authorities is as a rule not one founded on an equal and mutual basis. One single right for the individual is not counterbalanced by any single obligation by that individual towards the state. There is no interconnected legal relationship on which a reservation could have a reciprocating effect. Human rights are more similar to one-sided favours given by a state with regard to the individual. Where a state is not ready to recognize a claim-right for the individual on the international level the individual has no other choice but to submit to such a decision.

An individual may not be party to a treaty. The reciprocity effect of reservations operates on the norm system established by the treaty as far as it functions between the parties to the treaty. The formulation of article 21 is clear in this respect when it states that a reservation "modifies those provisions . . . *for that other part in its relations with the reserving State;*" (emphasis added). International organs having the competence to present claims for violations of human rights will not be in a position to benefit from any reservation that restricts its competence.⁶⁶

Participating states usually remain unaffected by any change that is introduced into the relationships between another party and its subjects. However, in certain cases and under certain conditions, a state may find its interests negatively affected where another party sets aside a norm guaranteeing a human right. This may be the case where its national residing in the territory of that other party has suffered a wrong due to a derogation from the obligations under a human rights treaty. The two Covenants of 1966 on the Economical, Social and Cultural respectively Civil and Political Rights do not limit the obligation to respect and ensure the rights under the Covenants only to nationals.⁶⁷ The Civil Rights Covenant for example uses the terms "everyone", "no one" and "all persons" except in article 21 relating to political rights which apply only to "citizens". A party has the right to resort to diplomatic protection where it considers that its national has not been treated in accordance with the provisions of the Covenant. Certain requirements governing the institution of diplomatic protection, such as the exhaustion of the local remedies, must of course be fulfilled.⁶⁸ A legitimate derogation in the form of a reservation debars a non-objecting party from the possibility to resort to diplomatic protection.⁶⁹ The reciprocal effect of a reservation could possibly be invoked where a confronted state has encroached upon a human right of a national of a state which has excluded the same right by means of a reservation and this reserving state wishes to resort to diplomatic protection.

The contracting states may have required the competence which goes beyond the traditional right of diplomatic protection. Where it is not founded on any encroachment on its own interests but contravenes some common goals. Such a competence to speak not only on one's own part but in the name of the community of states as such has to be expressly agreed upon. The above-mentioned Covenant on Civil and Political Rights provides in article 41 the possibility for a party to the Covenant to refer a violation of any civil and political right for the consideration of the Human Rights Committee and this without regard as to the nationality of the individual having suffered the wrong. The Committee will have the competence to consider such a claim provided that the state against which the claim is made has recognized the competence of the Committee. It is further required that the claimant state itself has recognized the

competence of the Committee. If this is not the case the Committee will, according to the terms of the Covenant, be barred from considering the communications from such a state. A respondent state having accepted the competence of the Committee may deny that competence where the claimant state has not accepted it.⁷⁰ Here the obligation to recognize the competence of the Committee works reciprocally. It proves that even with regard to human rights treaties reciprocity may be possible with respect to certain supplementary procedural relationships which are introduced in order to guarantee the implementation of substantive norms setting the relations between individuals and states. Although the declaration through which a contracting state recognized the competence of the Committee is a positive act of opting into a new obligation, and a reservation has more the character of a negative act of opting out of an obligation, reciprocity should in principle operate in both situations. The above-mentioned example shows that contracting states may enter into some sort of legal relations with each other even in the realm of human rights treaties. Where states have recognized the competence of an organ of inquiry or adjudication, the right of one state to have a case considered by the organ is correlated with the obligation of another state to submit to such a procedure. These rights and obligations are either explicitly reciprocal as is the case with the Human Rights Committee or implicitly reciprocal as may be the case with the ICJ.⁷¹

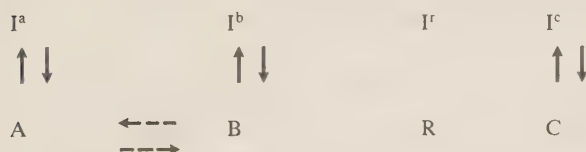
The question now arises if reservations may have any repercussion on the various relationships under human rights treaties as for example the Civil Rights Covenant.

It is difficult to conceive how the principle of reciprocity would operate with respect to the material norms of a human rights treaty. Breaches and violations of human rights are unlawful derogations from treaty obligations. A breach against a human right by one party does not free the other parties from their respective obligation. This is an important principle confirmed by article 60(5) of the Vienna Convention and also by certain specific treaties such as the 1949 Geneva Conventions on the humanitarian law of war.⁷² There is an imminent danger of retaliation where a party has violated the rights of individuals being nationals of another state party. Individuals should not become the object of retaliatory measures for the violation incurred by their home countries.⁷³

A reservation resembles a breach in that it also constitutes a derogation from an obligation. The derogation is however a legitimate one.⁷⁴ The case of illegal derogation through a breach and the case of legitimate derogation by a reservation are to be treated similarly with regard to the principle of reciprocity. Reservations which deny completely or restrict the liberties and rights of individuals will not constitute a permission for the other parties to allow a similar circumvention. Their obligations under the treaty will not be affected by the reservations of other states. This concerns all persons under the jurisdictions of the confronted states, that is, also residents being nationals of the reserving state. The reserving state by presenting a reservation considers it impossible to safeguard certain rights with regard to any person under its jurisdiction. A confronted state could possibly respond to such a reservation by denying these rights to residents on its territory being nationals of the reserving state. However, this action would be different from the step taken by the reserving

state. The reservation hits all persons under the jurisdiction of the reserving state. In respect of the confronted state the action would be of limited scope and as such of a discriminatory if not retaliatory nature. The principle of non-discrimination is a fundamental one which we find mentioned in the introductory provisions of the Human Rights Covenants.⁷⁵ A deviation from human rights with respect to the nationals of the reserving state would also be contrary to the duty not to resort to retaliatory measures through non-application of provisions for the protection of the human person. A further argument against any effort to apply the reciprocity principle in order to free oneself from an obligation of a humanitarian kind may be found in the wording of the Vienna Convention itself. As stated earlier, an accepting state may consider the treaty provisions as modified to the extent of the reservation in its relations to the reserving state. A confronted state accepting a reservation has therefore to recognize that the reservation may only be invoked on the level of interstate relations.

A reservation to a human rights treaty may occasionally work in two directions. Here we come back to the case where the substantive rules of conduct are supplemented by procedural rules of enforcement. On the one hand, a reservation exonerates the reserving state from the obligation to ensure certain rights for the individual and correspondingly deprives these individuals of certain claim-rights or liberties. The reserving state will also be protected against any possible claims of non-fulfilment of treaty obligations by the other contracting states. The confronted states, on the other hand, remain bound by the integral treaty with respect to all individuals under their jurisdiction. Their acceptance of the reservation signifies that they will loose any possible claim-right. This may be clarified through the following schemes:



In the first scheme we have the situation where no reservation disrupts the functioning of the norm system between state party A and its subjects I^a and state party B and its subjects I^b nor the relations between A and B themselves.

In the second scheme state R has formulated a reservation 'excluding' an obligation. Its subject I has lost any possible claim-right against R and R is at liberty to comply or not to comply with the prescription in the excluded provision. The confronted state C remains bound by the relevant obligation with regard to its subject I^c (comprising nationals of state R residing within state C and thus subject to the territorial jurisdiction of the latter). But C loses any possible claim-right with regard to R based on the excluded provision (reserved obligation).

Under certain circumstances, a confronted state having accepted the reservation may invoke the reservation against the reserving state itself.⁷⁶ If a confronted state has violated the very obligation which has been renounced by a reservation, the reserving state would not be able to invoke such a transgres-

sion. A situation which may well occur is that a national of the reserving state has experienced a wrong through the violation of the relevant obligation by the confronted state. A reservation debars the confronted state from asserting that a derogation from the norm which is the object of a reservation would be a breach. Here the reciprocal effect of the reservation may enter into operation, the reserving state would be similarly hindered from claiming a violation of that same norm by the confronted state where its own national would suffer a wrong.

If however the norm also forms part of the municipal law of the confronted state the reserving state may resort to diplomatic protection. Diplomatic protection may be conceivable where there has been a denial of justice due to manifest neglect within the judicial procedure. The protection by the reserving state is here not based on a breach of the treaty but on a breach of the obligation to guarantee a fair trial under municipal law. A claim could also be admitted if it asserts the discriminatory treatment of the individual with respect to his nationality. Where a confronted state has, for example, restricted the right of peaceful assembly for nationals of a reserving state which has 'excluded' the obligation under article 21 of the Covenant on Civil Rights, the latter may base its claim not on article 21 but possibly on article 2(1) prohibiting discriminatory treatment.

Reciprocal invocation of a reservation is also possible where the treaty itself introduces, or there is a pre-existent agreement on, a right for each single party to request the consideration of a question or to bring up a claim for the adjudication of a dispute by a special organ. Human rights conventions rely on various procedures for control and enforcement. The following example is construed on the basis of a statement taken from treaty practice. The United Kingdom formulated a statement to article 12(4) of the 1966 Covenant on Civil and Political Rights expressing the following norm:

"No one shall be arbitrarily deprived of the right to enter his own country".

The United Kingdom notified that it:

"... *reserve the right* to continue to apply such immigration legislation governing entry into, stay in and departure from the United Kingdom as they may deem necessary from time to time ..." (emphasis added).⁷⁷

If for example Sri Lanka would undertake measures restricting entry into its territory of persons of Ceylonese origin living in one of the East African states belonging to the British Commonwealth, the UK would not be able to claim a violation of the Covenant and bring the matter to the consideration of the Human Rights Committee. Now people of Ceylonese origin in a country belonging to the British Commonwealth would be so-called British subjects. The possibility for British subjects to enter the United Kingdom has been successively limited in the Commonwealth Immigrants Acts of 1962 and 1968 and further in the Immigration Act of 1971.⁷⁸ British authorities would on the basis of UK immigration laws deny the entry into the United Kingdom of such persons and perhaps claim that Sri Lanka would have a duty to receive them.

Both Sri Lanka and the United Kingdom have recognized the competence of the Committee.⁷⁹ According to article 41 of the Civil Rights Covenant the competence of the Committee will only operate reciprocally; both the 'claimant' and the 'respondent' state must have recognized this competence. The competence will also be reciprocally restricted where the norms, the implementation of which it may examine, have been circumscribed by a reservation.⁸⁰ The example has a certain drawback as it is not evident that the British statement has the character of a reservation. Is the United Kingdom necessarily the "own country" of a British subject? Does a restrictive immigration legislation necessarily mean the arbitrary deprivation of the right to enter a country? The United Kingdom would presumably deny this. Another state, in our case Sri Lanka, could possibly assert that British national legislation is arbitrary.⁸¹

The example does not prove that reciprocity will be possible on the level of the material rules of the Covenant. This will not be the case. Sri Lanka will not have the right to restrict the right of entry according to article 12(4) of the Covenant as a response to the British statement. The UK reservation (if recognized to be one) may have some long range reciprocal effects by limiting the own *locus standi* of the UK, its possibility to profit from the procedural rules of remedy. Although any derogation from article 12(4) by Sri Lanka remains illegal, the UK will not be able to claim formally a violation of the Covenant.

One may, of course, contend that where a reservation to a human rights treaty is allowed to have reciprocal effects it will be to the detriment of the individual. On the other hand, it must not be forgotten that any other confronted state having accepted the competence of a body such as the Human Rights Committee may bring the deviation to the consideration of that body. So any of the Nordic countries may, in the stated example, bring the measures taken by the government of Sri Lanka to the consideration of the Committee as each of them has recognized the Committee's competence.⁸²

It is part of the reality of international relations, however regrettable it may be, that states only reluctantly accept any compulsory disputes settlement procedures, and then quite often on the condition of reciprocity.

Where co-operation between states have achieved a high degree of integration the right of a state to use a remedy in the case of a violation of a treaty norm may be detached from that state's acceptance or non-acceptance of the primary material rules, the enforcement of which the remedy is to guarantee. A state does not have a claim-right based on the fact that it has a particular interest in the implementation of a treaty to which it is a party but it has a competence to act on behalf of the whole community where the relevant material norms only form a part of an integrated legal system. In the *Pfunders* case Austria did allege on the basis of article 24 of the Convention on Human Rights that Italy had violated the guarantees of fair trial under article 6. Italy contended that the Commission was not competent *ratione temporis* to examine the Austrian application as the relevant acts by the Italian authorities had occurred before the date of the Austrian ratification of the Convention. The Commission did not share Italy's view but considered the Austrian complaint. In its decision from the 11 January 1961 the Commission referred to the specifically objective character of the Human Rights Convention:

“... en concluant la Convention, les Etats Contractants n'ont pas voulu se concéder des droits et obligations réciproques utiles à la poursuite de leurs intérêts nationaux respectifs, mais réaliser les objectifs et idéaux du Conseil de l'Europe, tels que les énonce le Statut, et instaurer un ordre public communautaire des libres démocraties d'Europe afin de sauvegarder leur patrimoine commun des traditions politiques, d'idéaux, de liberté et de prééminence du droit;...”⁸³

The decision of the Commission has been criticized.⁸⁴ It is not clear to what extent the competence to submit complaints to the Commission according to article 24 of the European Human Rights Convention is independent from the actual adherence to the substantive rules of the convention. It is therefore doubtful if the reasoning of the Commission may support the view that the reciprocal effect of a reservation is also excluded with respect to the secondary norms of enforcement.⁸⁵

b. **Treaties concerning the laws of war**

Treaties concerned with the *jus in bello* are of special interest as they may have a humanitarian aspect. Many of them have been concluded in order to limit the suffering of various groups affected by war operations. Individuals and groups are accorded certain rights while imposing the correlate obligations, usually formulated in a negative way as prohibitions, on the state authorities. During the early generation of the treaties regulating warfare, the principle of reciprocity governed the implementation of the respective treaty norms. Where a belligerent state for one reason or another did not apply the treaty or certain of its provisions, the adversaries were to the same extent freed from their treaty obligations. By introducing the *si omnes* clause, or the clause of general participation, the framers of the Hague Conventions went far beyond the principle of reciprocity.⁸⁶ This clause permitted the parties to consider themselves as not bound by any treaty obligations in the case where one belligerent was not a party to the convention. The question could be put as to whether a reservation excluding certain obligations would also operate *si omnes* so as to exclude the relevant provisions from applying between all the belligerents. The drafters of the Hague Conventions had not contemplated this aspect. The provisions comprising the *si omnes* clause take cognizance only of the situation where a non-contracting power joins the war and not where a state only accepts part of the conventions.⁸⁷ The above-mentioned prize cases do not seem to have considered this situation. The question was only, to what extent a reservation could have a reciprocal operation between an accepting and a reserving state. Writers commenting upon the problem of reservation to the Hague Conventions did presumably consider that the *si omnes* clause was not applicable to the case of reservations. They generally considered reservations to these conventions to be undesirable as they would split up the norm system of a convention into a number of distinct norm systems having partly identical and partly different contents. If reservations would have been allowed to operate *si omnes*, a situation where there would be a number of parallel and different norm systems operating at the same time would never arise. Only one norm system would be in operation, namely the original as expressed by the

integral treaty text minus all the obligations in those provisions which had been 'excluded' by reservations.

Upon drafting later generations of treaties on the laws of war there was strong opposition to the principle of reciprocity, not to mention the *si omnes* clause, and this was due to the devastating effects it had on the operation of the norm systems under the Hague Conventions. For example, does article 82(2) of the 1929 Geneva Convention Relative to the Treatment of Prisoners of War dissociate itself from the *si omnes* clause. It was emphasized that the Geneva Conventions created a regime of obligations that consisted of "unilateral engagements".⁸⁸ Later opinions have tended to reassure the relevance of the reciprocity principle, not pushing to extremes the idea that the norms of the laws of war have to be followed in spite of the fact that other belligerents for some reason do not abide by these norms.⁸⁹ A belligerent state is hardly apt to consider itself bound by rules on warfare when an adversary is not ready to comply with them. The situation does not change very much where the non-implementation depends on non-participation in the treaty, the formulation of reservations or the violation of treaty norms. That states do have difficulties in abandoning the idea of reciprocal operation of the rules of warfare is proven by the many declarations on the reciprocal effect of obligations made to the various treaties regulating warfare.⁹⁰

Of the 107 states having ratified or acceded to the 1925 Geneva Gas Protocol up to 1 January 1986 as many as 31 states have declared that the obligations under the protocol were to operate reciprocally. Of these 31 states, 22 notified that they would apply the provisions of the protocol only in relation to other contracting states and that in a case where an enemy state failed to respect the prohibitions, these would cease to bind the declaring state with regard to the state violating the norms. The statements of 7 states confirmed the principle of reciprocity only with respect to violations of the protocol and 2 states made only general statements as to the reciprocal operation of the protocol.⁹¹ Most of these declarations occurred in the period before World War II, but 11 were presented after the war. These statements were introduced in order to erase any doubt as to the reciprocal nature of the treaty obligations and as such had the character of a general declaration of interpretations. Where a true reservation would have been formulated to the Protocol it will be supposed to operate mutually.

It has happened that a contracting state has formally reacted upon reservations withdrawing itself from an obligation that another state has excluded through a reservation. Such a statement was made by the United States when ratifying the four 1949 Geneva Conventions.⁹² The statement is not very clear as to its effects. The wording would suggest that only the changes intended by the reservations were rejected, claiming that the affected provisions remain in force. The debates in the US Senate show, however, that the US by its statement considered itself to be in treaty relations with the reserving states with respect to the remaining, unreserved parts of the conventions.⁹³ The matter regulated for example by article 85(2) of the Prisoners of War Convention dealing with the treatment of prisoners prosecuted and sentenced for precapture offences then is excluded from binding regulation under the

convention. The objection clarifies that the US will apply the rules under the reserved provisions in absence of any binding regulation, strictly on the basis of reciprocity. It has however been maintained that confronted states not having presented formal objections would be bound by the conventions with regard to the reserving states only on the basis of reciprocity. Thus it is denied that the obligations would be absolute.⁹⁴ The effects would then in practice be the same, the only difference is that in the case of the objecting state, the matter is not treaty-regulated as it is in the case of non-objecting states. The United States then would not have had to present a formal objection. The US statement could be construed as a declaration of interpretation as to the reciprocal operation of obligations under the conventions and to the effects of the reservations in the light of this assumption.

Even where confronted states have not explicitly invoked the principle of reciprocity with respect to reservations it may nevertheless apply. Where a reservation is accepted, the reserving and the accepting state cease to be bound in their mutual relations by the original norm as formulated in the respective provision. Instead, they are mutually bound according to the terms of the reservation. Where a reservation to a treaty on the laws of war is not accepted, the objecting state may consider only the reservation as void. It would in such a case designate any action in accordance with the reservation as a breach, making it possible for the objecting state to suspend or terminate the respective obligation.⁹⁵ In the first case, the derogation from the original norm has to be construed as a conforming to a new norm, usually being opposite to the original norm. In the second case, the derogation constitutes a breach followed by retaliatory measures by the objecting state.

The discussions on the question of reciprocity with regard to the various cases of derogation from the rules of warfare, lawful reservations and reprehensible breaches, seem to have been plagued by a certain uneasiness. On the one side, we find the categorical distrust towards the reciprocity principle caused by fear of the deteriorating effects it may have on the implementation of the rules of war and the ensuing disasters for the protected persons that may follow therefrom. On the other side, we find profound doubts as to the tenability of absolute obligations disconnected from any considerations of reciprocity. As the French delegate, Lamarle, to the 1949 Diplomatic Conference in Geneva put it: "... any regulation of the laws of war would have not only to protect the rights of the individual but also the rights of the states."⁹⁶ Belligerent states would not easily abandon the principle of reciprocal operation of obligations where the adversaries would not assume the full burden of treaty obligations as they do themselves. They would not be content with the limited operation of the reciprocity principle as was the case of the ordinary human rights treaties, where a confronted state was still bound by all the substantive obligations under the treaty. Instead, there will be a tendency to advocate a freedom of action with respect to the subject-matter affected by the reservation. A confronted state will probably assert that it is no longer bound by the relevant prescriptions of the treaty. This is a view which has also been propagated by a number of writers commenting more recently on the question.⁹⁷ However, it would still not be correct to maintain that the laws without distinction operate reciprocally.

There have been efforts to save something of the idea of the absolute bindingness of the humanitarian law of war. One attempt is based on the belief that it is possible to make a distinction between two kinds of norms constituting the body of the laws of war. On the one hand, there would be norms relating to the war which have a purely humanitarian character as they are solely introduced to protect the individual person against unnecessary suffering. On the other hand, there would be norms of purely 'technical' character regulating military operations and the dealings between the belligerent parties. Article 1 of the Hague Convention (XI) Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War establishes the inviolability of postal correspondence of belligerents which is found on board a neutral or enemy ship and the duty of the captor to forward it with the least possible delay. This obligation is presumably not of a humanitarian character.⁹⁸ Similarly, the obligations under the 1907 Hague Convention (III) Relative to the Opening of Hostilities provides obligations of a non-humanitarian kind. A norm of an unequivocally humanitarian kind is formulated in article 77 of the 1977 Additional Protocol I to the Geneva Conventions of 12 August 1949, which in its paragraph 5 prohibits the execution of the death penalty for an offence related to the armed conflict on persons under 18 years of age. Where a contracting state enters an 'excluding reservation' to this provision, a confronted state will not be permitted to make use of the liberty under the reservation. The obligation in question is not conditioned by any reciprocal compliance to it. A derogation from this prohibition under article 77 would be a violation of the protocol. A belligerent not respecting the prohibition with regard to children being nationals of the reserving state, would also constitute a plain breach of the basic condemnation of retaliatory measures. Retaliation may be given a broad meaning, not only comprising a reaction towards breach but also a reaction towards a derogation by means of a reservation.⁹⁹ The prohibition under article 77(5) is to be considered as of a humanitarian nature although the acts prohibited do not figure among the grave breaches enumerated in article 85. Reservations formulated to the provisions condemning these grave breaches would probably be incompatible with the object and purpose of the Geneva Conventions and the Additional Protocol and consequently void. Any reciprocal effects will already be excluded on the basis of the reservation rules. Only an admissible and accepted reservation will have reciprocal effects. This lack of non-reciprocity will be further strengthened by the prohibition of reprisals.

The trouble is that there are many norms regulating warfare which have a mixed character, partly regulating the execution of armed operations and the pursuance of war as such, and partly protecting civilians and military personnel against unnecessary suffering. Norms which regulate the use of certain weapons will have such a mixed character. These rules are usually the outcome of considerations embracing both views of tactical and strategical expediency as well as moral evaluations. The obligations under the 1925 Geneva Gas Protocol concern the use of certain means of warfare, where both strategical and humanitarian aspects interplay.¹⁰⁰ They must be held to satisfy in the first place purposes of a humanitarian nature. Nevertheless, states have affixed declarations to their ratifications and accessions clarifying that they would

abide by the prohibition only on the condition of reciprocity. It thus appears that the military interests of states override humanitarian considerations in uncertain cases. On the other hand, it must not be forgotten that the reciprocity principle has two sides. According to some writers the negative effect of the reciprocity principle has been stressed too much.¹⁰¹ Reciprocity works not only as an escalation leading to the introduction of new weapons and methods of warfare and the increasing deviation from the rules of war, it also may have a salutary, positive effect because it functions as a deterrent to any derogation from treaty obligations.¹⁰² It may keep the belligerents from using certain types of weapons even in the absence of any formal prohibitions. Ideas of reciprocity to quite a large extent guide the military operations of belligerents. Tacit agreements are quite common between warring powers.¹⁰³ The first derogatory step with regard to an express or tacit agreement is the crucial incident that turns the principle from a positive to a negative force.

An invocation of the reciprocity principle may be regarded as inconsistent with commitments under another treaty. Ireland declared on ratifying the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological and Toxic Weapons and their Destruction (BW-Convention) that any statement of reciprocal operation of the obligations under the Geneva Gas Protocol would be inconsistent with the prohibition of the possession of B-weapons in the 1972 Convention and consequently withdrew its declaration of reciprocity to the 1925 Protocol.¹⁰⁴ This was the only case where a participation in the BW-Convention led to the withdrawal of a statement of reciprocity to the 1925 Protocol.

A conclusive answer to the question of reciprocal operation of reservations to treaties relating to the laws of war can hardly be given. Whether a confronted state will be freed from certain obligations under the laws of war on the basis of reciprocity has to be determined by considering a number of factors: the very contents of the norm affected by the reservation, the kind and frequency of derogations resorted to by the reserving state, etc.¹⁰⁵ A derogation by a confronted state need not have the character of retaliation and thus be prohibited, but be more a move to limit any advantages the reserving state may have gained by making use of its reservations. Reservations are usually not formulated to norms having primarily a humanitarian character, so the reciprocal application of a reservation may in reality not provoke any disputes.¹⁰⁶

c. Treaties creating objective regimes

Multilateral treaties are a way of instituting so-called objective regimes. The contracting parties agree to make a delimited area subject to a specific legal order as for example the demilitarization, the denuclearization, the common exploitation or exploration of that area or the freezing of possible claims to it. All the parties agree to respect the status of the area on the condition that the other parties do so equally. It lies in everybody's interest that the regime agreed upon is recognized without any exception by all the states concerned. The interests are not only common, but they are also complementary as each of them wants to safeguard that none of the others will violate the regime. These

treaties cannot be compared with treaties that will operate on a mutual basis. Each party has assumed the obligations on the condition that all the other parties assume similar obligations. That each commitment to the norms of the treaty will be integral and not subject to any restrictions is tacitly assumed by every state participating in the treaty.

Where a derogation by one of the parties occurs through a breach, this does not as such free the other parties from their obligations. However, if the breach is grave the other states may through a common agreement suspend or terminate the treaty in their relations with the defaulting state.¹⁰⁷ This could be the case with respect to treaties establishing common regimes of exploitation or exploration.¹⁰⁸ If the breach radically changes the position of every party making it impossible to require the further performance of the treaty obligations, any party may individually suspend the treaty in whole or in part with respect to itself. This would be the case in demilitarization and disarmament treaties. A one-sided derogation from the obligations of such a treaty vitiates its effective operation and therefore it is not justified to oblige other parties to be bound by an obligation where one state goes free.¹⁰⁹

Where the derogation is contemplated by means of a reservation, there is the danger that the implementation of the norm system will not make much sense.¹¹⁰ Either the treaty as such may prohibit the formulation of any reservation or the reservation will be branded as incompatible by other states.¹¹¹ If the reservation is not withdrawn, the confronted states may consider the whole instrument of ratification by the reserving state as void. If the participation of the reserving state is essential to achieve the aims of the treaty, the other states may finally abandon the project for regulation and the efforts to create an objective regime have failed. The full implementation of the norms by one state is very much conditioned by the respective implementation of the norms by the other contracting parties. A reservation or a breach may in fact have effects analogous to the ones of the *si omnes* clause of the Hague Conventions on the laws of war.

Treaties belonging to this category are the 1959 Antarctica Convention, the 1967 Tlatelolco Treaty for the Prohibition of Nuclear Weapons in Latin America, the 1967 Outer Space Treaty, the 1971 Sea Bed Treaty and the 1979 Agreement Governing the Activities of States on the Moon and other Celestial Bodies. Except for the Tlatelolco Treaty (article 27) the other treaties do not have a reservation clause prohibiting reservations, but provide instead a machinery for the amendment of treaty norms in the case there is dissatisfaction with them and a right of withdrawal at short notice due to extraordinary events jeopardizing the supreme interests of a party.¹¹² Reservations are thus either categorically prohibited or their use is made unnecessary by other means for accommodating the vital interests of the parties.¹¹³

19.3.2 Impracticability of reciprocity due to the substance of the reservation

A reservation may be of such a kind that the confronted states will not be able to profit from invoking the reservation on their part.

The modifications envisaged by the reservation may prevent a confronted state from invoking the reservation for its own benefit. Thus, for example, the

Israeli statements to the Geneva Red Cross Conventions on the humanitarian law of war reserve the liberty to use the Red Shield of David, denying the obligation to use only one of the three recognized emblems in order to profit from the protection under the conventions. A reservation may also refer to a peculiarity of the internal legal order. Imbert mentions as an example the "reservation" by Israel to the 1950 Convention on the Declaration of Death of Missing Persons.¹¹⁴ Through this statement Israel informed that the effect of foreign declarations of death as regards the dissolution of marriage depended on whether the Israeli religious courts would be able to recognize the same in accordance with their religious laws.¹¹⁵ Reservations to the various conventions on narcotic drugs are another example of reservations which do not allow for reciprocal operation.¹¹⁶

The example of colonial declarations which have occasionally been referred to this group of reservations is an unhappy one.¹¹⁷ A colonial declaration is not as such to be equated with a reservation. It is more a case of representation and the competence to bind another legal entity on the level of international relations. A colonial declaration could be, but is mostly not, a reservation. Where a metropolitan state simply declares that a dependent territory is or is not bound by a treaty, it is not a case of a reservation but of participation in the treaty. The declaration affects the implementation *ratione personae* of the treaty. A colonial declaration answers the question if there is only one entity (the metropolitan state) or if there are more entities (the metropolitan state and a certain number of territories which will be bound by the treaty). However, if the statement were to indicate that only part of the treaty is to apply to the dependent territory, it amounts to a reservation.¹¹⁸ Thus, a metropolitan government may formulate either a reservation with regard to itself or the dependent territories or both. A colonial declaration which is also a reservation, is a reservation that is presented on behalf of a territory which has not yet gained independence. Theoretically reciprocity could well be possible with regard to a reservation entered into in the name of a dependent territory through a "colonial declaration". If, for example, the metropolitan state could make use of the possibility to exclude the obligation to recognize foreign arbitral awards which are not of a commercial character according to the local legislation which is provided for in article X of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards with respect to a dependent territory, there will be no hindrance to other parties to invoke the limitation against a party where the claim originates from an individual or an authority in the dependent territory.¹¹⁹ Colonial declarations of this latter kind do not differ from "normal" reservations and are therefore not to be mixed with reservations of the present chapter which operate only in one direction.

19.3.3 Non-reciprocity as a condition for a reservation

There are reservations which do not in their substance exclude reciprocal invocation, but where the unilateral invocation of the reservation is made the condition for participation in the treaty. The purpose of such a reservation is to provide an advantage exclusively to the benefit of the reserving state. The reserving state is freed from certain obligations, whereas the confronted states

will still be bound not only in their internal relations but also in their relations with the reserving state. Such reservations are found among the so-called *negotiated reservations* that some states are authorized to make to International Labour Conventions, to which reservations as a general rule are not permitted.¹²⁰ Negotiated reservations have the function of accommodating the special needs of, for example, developing countries which would feel the burden of guaranteeing the ILO minimum standards on labour conditions as too heavily curtailing their chances of competing on the same conditions with states which have a developed infrastructure and therefore better possibilities to meet the requirements of the ILO conventions. The possibility of permitting a more favourable regime to developing countries is already envisaged by article 19(3) of the ILO Constitution. Modifications may be suggested to ILO conventions to meet the "special needs of countries having substantially different industrial conditions due to climate or to the imperfect development of its industrial organization". Such reservations have been agreed on by the Labour Conference and they clearly state to what extent states may substitute a lower standard than the normal standard laid down by the ILO convention.¹²¹ Developed states may not apply such a lower standard by invoking the principle of reciprocity. This may already result from the special character of ILO conventions guaranteeing human rights on the interstate level. However, negotiated reservations will exclude reciprocity on the level of procedural rights and obligations. A state profiting from a lower standard by means of negotiated reservations may well file a complaint under article 26 of the Constitution of the International Labour Organisation against a member state which has not observed a higher standard with respect to the same subject-matter.¹²²

19.3.4 Impracticability of reciprocity due to factual unfeasibility

Even if the nature of the treaty norms, as well as of the reservation is such as to allow for a reciprocal invocation of the reservation, this may be unfeasible due to circumstances not contemplated by the treaty and the reservation. Such a situation may be at hand where national legislation has incorporated the treaty norms. Even if a reservation would make it theoretically possible for a confronted state to consider itself as not bound by the relevant treaty norm it may, nevertheless, consider its freedom of action as circumscribed by its own national legislation. We may take as an example the reservation formulated by the USSR to article 23 of the Territorial Sea Convention permitting innocent passage of warships only on the basis of prior authorization by the coastal state. If Sweden were a party to the Convention, it would according to article 21(1)(b) of the Vienna Convention have the right to make the passage of Soviet warships through the Swedish territorial sea depend on prior authorization. The Swedish authorities, in this case the Ministry for Foreign Affairs, will follow the Swedish legislation. The Swedish "Tillträdesförfordning" (Statute of Access) according to its article 3 paragraph 1 does not require any special authorization for foreign warships to pass through the Swedish territorial sea.¹²³ The Finnish Act of 1963 on the surveillance of the land and territorial waters as well as the air space in its article 15 only stipulates the obligation to

notify two days in advance of the innocent passage of a foreign warship through the Finnish territorial sea. An authorization is only required in the case where the warship intends to visit the internal waters.¹²⁴ In the above-mentioned prize case of *The Porto* the French Conseil des prises did not argue along these lines. It did not assume the French authorities to be bound by the French instructions to the navy of 1912, which in their article 1(6) reiterated the rules in articles 3 and 4 of the VI Hague Convention.¹²⁵

To what extent the authorities of a state will consider themselves bound by internal regulations depends partly on which doctrine on the fulfilment of treaties prevails, the *doctrine of transformation* or the *doctrine of adoption*.¹²⁶ In both Finland and Sweden the dominating view has been that treaty norms must be transformed and made part of the internal legal system.¹²⁷ Finnish and Swedish authorities will on the first hand follow the norms of municipal law. In countries where the doctrine of adoption prevails it would seem easier to invoke the principle of reciprocity by the local courts and authorities. French legal practice has adhered to the doctrine of adoption. For a treaty to become applicable by the French authorities promulgation was only required before 1946 and publication with or without ratification after 1946.¹²⁸ With regard to the question of supremacy of either the international treaty law or the national law, French courts vacillated for long. The general impression has been that both treaties and municipal laws have been given equal status, letting conflicts be decided according to the principle of *lex posterior* or constructing the conflicting instruments so as to exclude any possible conflict.¹²⁹ With the constitutions of the IVth and of the Vth Republic the supremacy of treaties has been guaranteed and has been recognized by both administrative and judicial practice.¹³⁰ However, according to article 55 of the 1958 Constitution the French courts will have to recognize the supremacy of treaties only with regard to states equally accepting the supremacy of treaties, which may be inflicting on the courts a very difficult task of investigation.¹³¹

It would appear that the principle of reciprocal operation of reservations will have less chance of being invoked where a state applies treaty norms only on the condition that they have been transformed so as to form part of internal law. Such treaty norms 'received' into the municipal legal system acquire an independent existence with respect to the original treaty norms. Local authorities will apply these norms irrespective of what happens to the treaty norms. Termination or suspension of the whole or parts of the treaty will not affect the implementation of the identical but independent rules of the municipal law if no legislative act has been undertaken to abrogate the norm.¹³² Neither does the non-participation of a state in the treaty affect the operation of the national legal norms if the reciprocal operation is not made part of that norm. *A fortiori* the disengagement from a certain norm by means of a reservation does not affect the application of the national legislation within the confronted state. This is why, for example, the Finnish and Swedish rules on innocent passage of warships through the territorial sea apply to ships of all countries without distinction of their commitment to the rule of innocent passage.¹³³

Within the harmonization of private international law through conventions of the Hague Conference on Private International Law differences between national legal institutions may exclude the possibility of reciprocity. A state

which does not provide for divorce may present a reservation to the 1970 Hague Convention on the Recognition of Divorces and Legal Separations, excluding the duty to recognize a divorce in those cases where one of the spouses is a national of a state whose law does not provide for divorce. A contracting state whose law provides for divorce may not reciprocate, because there are no divorces the recognition of which it may deny.¹³⁴

The question of invoking a reservation presented by another state on the basis of the principle of reciprocity arose in connection with the shooting of Woman Police Constable Ywonne Fletcher during a demonstration in front of the Libyan People's Bureau on 17 April 1984 in St James's Square. After the UK had terminated diplomatic relations with Libya the People's Bureau was evacuated on 27 April 1984. The persons leaving the premises of the Bureau were questioned and electronically searched. Diplomatic bags that left the Bureau were not searched or scanned. The decision was not the result of the application of the Vienna Convention rules on reservations but of a political judgement. Libya was one of the countries that formulated a reservation to article 27(3) of the Vienna Convention, reserving its right to request the opening of the diplomatic pouch. As the UK had not chosen to object to this reservation (as done for example with regard to a similar reservation by Bahrain) it maintained its right to benefit from the Libyan reservation on the basis of reciprocity. This right was present even if Libya in fact had not made use of its reservation. The decision not to request the opening of the Libyan diplomatic bags was guided by considerations of expediency. The Libyan government which up to then had not applied its reservation in its relations with the UK would now have found a reason to do so.¹³⁵

CHAPTER 20

TREATY RELATIONS BETWEEN RESERVING AND OBJECTING STATES

As mentioned earlier, during the era of the unanimity rule a single objection would bar a reserving state from becoming a party to the treaty. A reserving state had in such a situation only two options: Either it decided to abandon its reservation in order to become a party to the treaty, or if it was not ready to sacrifice it and was therefore forced to remain outside the treaty. The unanimity rule does survive on a limited basis with regard to the so-called restricted multilateral treaties. With respect to organizational treaties an objection may or may not have the effect of invalidating the reservation, depending on whether the objecting states belong to the majority or the minority in the competent organ that has to decide on the admissibility of the reservation.

Apart from this, provided that there are no reservation clauses to the contrary, the legal effects of objections are indicated by article 21(3) of the Vienna Convention. This provision had quite a turbulent drafting history. Once the ILC was ready to abandon the unanimity rule, guidance was looked for in the Pan-American regime on reservations. The 1928 Inter-American Convention on Treaties adopted at the 6th International Conference of American States in Havana did not in its article 6 on reservations mention objections and their legal effects.¹ In 1932 the Governing Board of the Pan-American Union, in connection with the elaboration of depositary procedures to be followed by the Union, drew up three rules relating to the juridical status of treaties ratified subject to reservations. The last of these three rules stated that the treaty shall not be in force between the state entering a reservation and another state not accepting the reservation.² This rule was later termed the "maximum effect" rule as it conferred to an objection the maximum effect of excluding all relations under the treaty between the reserving and the objecting state.³ The substantive rules on treaties ratified with reservations were not adopted at the 8th Inter-American Conference convening in Lima in 1938 where the procedural rules relating to the depositary functions had been confirmed, but this was not because there was any marked opposition to these rules.⁴ After a thorough penetration into the question of the admissibility of reservations, where the Inter-American Juridical Committee of the OAS and the Inter-American Council of Jurists had at times completely opposite views, there was finally a reversion to the earlier practice of the PAU.⁵ The Inter-American Council of Jurists in its resolution X of 1959 maintained that objections were to be given maximum effect precluding the operation of the treaty between the reserving state and the objecting state. However, the maximum effect rule had now been modified to provide an option for the objecting state to declare that it in spite of the objection desires to enter into treaty relations except for those provisions covered by the reservation.⁶

In his first report on the law of treaties Waldock embraced the maximum effect rule in his draft article 19(4)(d).⁷ On the basis of the discussions of the 653rd and 654th meetings of the 14th session of the ILC in 1962 Waldock revised his draft to the effect that treaty relations were to exist between reserving and objecting state where the latter explicitly so wished.⁸ This modified maximum effect rule found its way into article 20(2)(b) of the draft submitted in the 1962 Report to the General Assembly.⁹ In their comments on the 1962 draft the governments of Czechoslovakia and Romania advocated a reversal of the presumption of maximum effect of a reservation in favour of the "minimum effect".¹⁰ The proposal to settle in the first place for the minimum effect with the possibility to opt for the maximum effect was backed by some of the members of the ILC during the 17th session in 1965 and even convinced the rapporteur Waldock that this was the natural presumption.¹¹ In spite of these efforts, the final draft of the ILC maintained the original rule in accordance with the Pan-American regime establishing a presumption for the maximum effect of a reservation excluding all treaty relations between reserving and objecting states.¹²

During the Vienna Conference certain states proposed amendments in order to reverse the presumption for the maximum effect. Such proposals were made during the first session of the Conference by the Soviet Union, Czechoslovakia and Syria.¹³ The amendments were rejected by the Committee of the Whole during the first session by 48 votes to 28 with 8 abstentions.¹⁴ During the second session the proposal was taken up again in a new amendment submitted by the Soviet Union.¹⁵ The Committee of the Whole was not ready to accept the Soviet amendment and approved the text of the Drafting Committee by 60 to 15 votes with 13 abstentions.¹⁶ There was a sudden and unexpected occurrence at the 10th plenary meeting of the Conference on 29 April close to the closure of the Conference on 22 May 1969, when the Soviet amendment was adopted by 49 votes to 21 with 30 abstentions.¹⁷ It is surprising that the reversion was brought about by a number of Latin American states changing their minds on this question thus abandoning a rule that was established in Inter-American treaty relations.¹⁸

The argument advanced by the Soviet government in its explanatory memorandum to the Plenary Conference and by the Polish member to the Committee of the Whole, to justify the rule that an objection not indicating the effects it was to have on the relations between the reserving and the objecting state permitted treaty relations with respect to the unaffected provisions, is not tenable. It is based on the assertion that because certain objecting states not wishing to have treaty relations with the reserving state have expressly indicated this, silence in this matter presupposes consent to let the treaty enter into force with regard to the reserving state. This *argumentum a contrario* is not convincing as it must further be proved that resorting to such a specification of the effects of an objection is made out of a conviction that there is a legal obligation to invoke such an effect. The argument is further contradicted by the fact that there are cases where an objecting state has expressly clarified that its objection does not preclude the entry into force of the treaty between itself and the reserving state.¹⁹ The fact is that objection practice on which the minimum effect presumption might be based has not been consistent.

The expert consultant to the Conference, Waldock, formerly rapporteur on the law of treaties to the ILC, passed a concluding comment on the discussions regarding the legal effect of treaties where the development had gone from the plain maximum effect rule, as presented in his first report on the law of treaties, over the modified maximum effect rule, as subscribed to by the ILC in the session of 1962 and 1965, to the modified minimum effect rule in the final convention text, by stating that it was actually not a problem which way the presumption worked provided only that there was a clearly established rule.²⁰ The Vienna Convention is thus based on a compromise which is closer to the original views of the Soviet Union and the socialist states than the traditional view long defended by a number of Western states. The socialist states had since the incident of the reservations to the Genocide Convention propagated an unfettered liberty to make reservations. Quite early they made the concession that where a reservation was disputed the relevant provision would not apply at all between reserver and objector. A further concession was made to the effect of providing the objecting state with the possibility to exclude any treaty relations between itself and the reserving state. On the opposing side the way has been long from the unanimity rule, over (some kind of) collegiate procedure with a majority decision to the plain maximum effect, the modified maximum effect and finally the modified minimum effect rule. Subsequently, questions have been raised and criticism has been expressed as to the formulation of the rule on the legal effect of objections. It seems that the Conference because of the sudden change was unable to foresee the full implications of the reversion of the presumption on the legal effects of an objection.

A criticism of a more political character has been presented by Sinclair. According to him, the Vienna rules as they now stand are unfavourable to smaller states, these states will sometimes find it difficult to resort to a qualified objection where the reserving state is a powerful neighbour.²¹ This danger is perhaps exaggerated. Moreover, the reversed presumption that no treaty relations exist between reserving and objecting state would not provide better protection against possible pressures. A small state afraid that its objection may lead to unfavourable consequences will feel compelled not to advance any objection at all. Another argument for the original presumption was that objections precluding any treaty relations between reserving and objecting state would possibly push the reserving state to abandon its reservations, whereas the minimum effect rule would have no such impact.²² Here again it must not be forgotten that any confronted state may according to the Vienna Convention, if it really so desires, qualify its objection in order to influence the reserving state to withdraw its reservation.

A question of crucial importance is, if the minimum effect rule erases the difference between the acceptance of a reservation and the plain objection to a reservation. The Conference did not have the time to delve into the problem. The discussion was somehow diffuse and the delegates had troubles in understanding each other. The situation had been no different during the 17th session of the ILC where the question was touched upon. Yasseen was the member who most clearly stated that the minimum effect rule was actually making the difference between acceptance and objection illusory.²³ Similarly,

Tsuruoka expounded the view that in the case where the objecting state declared itself willing to enter into treaty relations with the reserving state (i.e., minimum effect) an objection had the same effect as an acceptance.²⁴ Tunkin felt that the objection in this case was a single declaration of a political character, because it would have an effect no different from an acceptance.²⁵ Others again proposed that such objections being not real objections should be treated only in connection with the acceptance of reservations.²⁶ Maintaining the reference to the secondary rule of minimum effect objections in article 17 of the ILC draft concerning acceptance of and objection to reservations and in article 19 on the legal effect of reservations and objections was simply in order to maintain a congruence between the two provisions.

The fears so vehemently expressed by Yasseen were probably not understood, or were downgraded or ignored, because the minimum effect rule was still, during this phase of the discussions, a secondary rule.

As a result of the reversal of the presumption making the minimum effect rule the primary one, the doubts expressed by Yasseen gained new relevance. The Drafting Committee, with Yasseen as chairman, thought it now consistent to change paragraph 3 of article 19 concerning the legal effect of objecting so as to state in unequivocal terms that legal effects of objections were the same as those of acceptances.²⁷ However, this statement went too far and did not even correspond to the views of those delegates that had been in favour of the reversion of the presumption. The amendment initiated by India, Japan, the Netherlands and the USSR wanted to replace the words, "the reservation has the effects provided for in paragraphs 1 and 2" (i.e., concerning the legal effects of accepted reservations) which originated from the Drafting Committee by the words, "the provisions to which the reservations relates do not apply as between the two States to the extent of the reservation."²⁸ These were the same words as originally used in the draft of the International Law Commission. There was thus a clear desire not to assimilate rejected and accepted reservations. Apparently it never became quite clear to the delegates how far the legal effect of a simple objection was to be distinguished from the legal effect of an acceptance. The Netherlands delegate Maas Gesteranus, being one of the sponsors of the four powers amendment, saw a difference with respect to the so-called modifying reservations. As concerns a 'modifying reservation' an acceptance would have the effect of making the provision applicable in its modified form, whereas an objection would have the effect of making the original and the modified norm inoperative.²⁹ With regard to an 'excluding reservation' he believed no difference to exist. A provision affected by a reservation was not to apply between a reserving state and an objecting state. The distinction indicated by Maas Gesteranus may lose its significance when assuming that reservations are mostly of the 'excluding' kind.³⁰ Legal doctrine has on various later occasions avowed the view that the legal effect of an accepted 'excluding reservation' is the same as that of an unqualifiedly objected 'excluding reservation'.³¹

The view that the institution of objections is in the end void of any special effect is discomfiting as it was intended by the framers of the Vienna Convention to be the means by which the parties to a treaty safeguarded

themselves against unwelcome reservations. On the basis of the conception of reservation introduced above in chapter XI, as not excluding a provision being a norm formulation, but as “excluding the *legal effect* of a provision” or to put it more lucidly: “modifying the *force* of a norm”, a clear distinction between the legal effects of an acceptance and the legal effects of an objection may be made. Through an ‘excluding reservation’ an obligation for the reserving state and a right for the confronted states is ‘excluded’, i.e., denied. This denial results in the assertion of the opposite right for the reserver. The most common case is that a duty is substituted for a liberty. The obligation to apply “reasonable” tariffs and charges to traffic in transit was denied by the FRG through a reservation to article 4(2) of the 1965 Convention on Transit Trade of Land-Locked States.³² The FRG remained thus free to apply reasonable or what could be considered as unreasonable tariffs.

The ‘excluding reservation’ is all embracing. It introduces the opposite norm with regard to all persons, things, acts, events or situations covered by the regulation. In other words, only the force but not the content of the norm is modified.

Considering the case of the ‘modifying reservations’, a distinction between quantitatively and qualitatively modifying reservations could possibly be drawn. The former group of reservations popularly called ‘restricting reservations’ is without question the more common one.³³ The modifying effect now relates to the content of the norm. The number of persons, things, acts, events or situations under regulation is limited on particular grounds. India formulated a reservation to article 2(I)(a) of the 1928 International Convention Relating to Economic Statistics exempting the obligation to compile and publish statistics on her external trade with respect to transit trade.³⁴ Instead of having an obligation to compile and publish statistics on transit trade as exists for other external trade, India reserved for herself the liberty to decide whether or not to do this. She remained free to provide statistics on such trade whenever she felt it appropriate. It is possible to construe the modification of the content as a modification of the force with respect to the excluded cases.³⁵

Qualitatively modifying reservations would, for instance, alter the way a right is to be realized. Germany desired originally to present a reservation to the 1910 Convention for the Suppression of White Slave Traffic allowing parties on certain conditions to execute *commissions rogatoires* directly by their diplomatic and consular officers.³⁶

According to article 1(3) of the 1961 Hague Convention on the Conflict of Laws Relating to the Form of Testamentary Disposition the determination of whether or not the testator had his domicile in a particular place shall be governed by the law of that place. Now a contracting state may reserve the right in accordance with article 9 to determine in accordance with the *lex fori* the place where the testator had his domicile.³⁷

There may be some doubts as how to make a distinction between ‘excluding reservations’ and ‘modifying reservations’ of the restricting kind. The solution of this problem depends on how one reads a certain provision: either it expresses a single general norm or a compound of a number of more specific norms. Take for example the statement by Iran as far as it covers articles 2 and 26(2) of the Convention on the High Seas. With respect to the freedom to lay

submarine cables and pipelines on the bed of the high seas (under article 2(1)(3)) Iran formulated a 'restricting reservation'.³⁸ The Iranian government had declared that it did not approve of the freedom to lay cables on the continental shelf part of the seabed. It was an 'excluding reservation' with regard to article 26(2) concerning only the question of submarine cables and pipelines on the continental shelf. Articles 2(1)(3) and 26(1) express a broader, general norm, of which the norm under article 26(2) is a specific case. Theoretically every norm of a general nature may be split up into norms of more limited scope. Every 'restricting reservation' could in the end be construed as an 'excluding' one.

It has been contended earlier in this work that the expression "excludes the legal effect of certain provisions" is not to be read as excluding the subject-matter from legal regulation. An 'excluding reservation' has a *contra-regulatory* effect: The reservation does not intend to exclude the original rule without placing any other norm in its place, but it does intend to introduce the opposite norm. Where the original norm is a duty, a liberty is proposed with the purpose of becoming binding on the other parties. Now, if the reservation is accepted the confronted states agree to this liberty for the reserving state. An objection necessarily means an opposition to the introduction of the opposite norm. An objection has not the same *contraregulatory* character as the reservation. If this would be the case an objection as a denial of the liberty proposed by the reservation would amount to the assertion of its jural opposite, that is the original duty as manifested in the adopted treaty text. This would be unacceptable if maintaining the postulation that treaty relations are consensual in nature and also the operation of reservations is based on the consensual character of international rights and obligations. This cannot be assumed to be the intention of the objecting state, although it certainly wishes that the original norms were to apply without alterations.³⁹ An objection is to be understood as an opposition to the introduction of an opposite norm by the reserving state. Where a reservation is met with an objection this has to be seen as the clashing of contradictory views. A reserving state cannot force the objecting state to accept the proposed liberty and the objecting state cannot force the reserving state to accept the original duty. There is disagreement on the regulation of the subject-matter which has the result of placing it outside the regulation by treaty. An objection has a *deregulatory* effect.⁴⁰

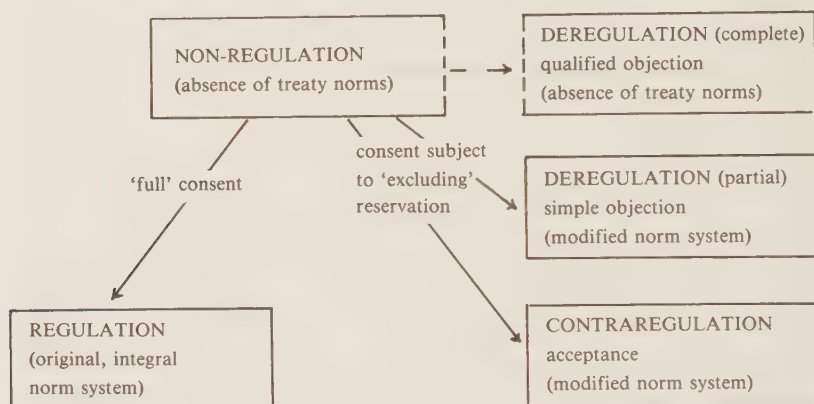
In other words a reservation denies an obligation to do act a ($\neg 0a$), whereas on objection would like to assert the obligation and deny the liberty to do a ($\neg \neg 0a$ or $0a$). The effect of an objection would be that there is no valid formulation of a norm prescribing a liberty to do a ($\neg' \neg 0a'$) nor a valid formulation of a norm prescribing a duty to do a ($\neg' 0a'$). Consequently, there does not exist any norm under the treaty system regulating act a. In order to clarify reservation terminology we have to say that a reservation envisages a modifying effect and an objection an excluding effect, either with regard to the affected norms or the whole treaty.

Where a treaty relates to a subject-matter hitherto unregulated the acceptance of an 'excluding reservation' does not restore the *status quo ex ante*, the situation where a binding regulation is absent. An accepted 'excluding reser-

vation' leaves the subject-matter regulated by the norm system established under the treaty and the accepted reservation. An 'excluding reservation' simply introduces an opposite norm into the system. A reserving state may bindingly invoke a liberty or any other kind of right which is contrary to the original obligation under the treaty.

An objection however removes the subject-matter from regulation under the treaty. With respect to the relevant subject-matter we are back to the situation as it existed before the entry into force of the treaty.⁴¹

The effect of accepted and objected reservations may therefore be explained by the three concepts of *regulation* – *contraregulation* – *deregulation* (*non-regulation*) which are interrelated in the following way:



The legal basis of the contraregulation between the reserving and the accepting state is the agreement which has emerged on the basis of the notified reservation and its express or tacit acceptance. The relevant subject-matter is not legally regulated between the reserving state and the objecting state due to the disagreement that exists between them as to the force of the legal norm.⁴²

The practical effects of an objected reservation depend very much on the nature of the rights and obligations involved. Tunisia entered a reservation to the 1958 Territorial Sea Convention stating that it considered itself as not bound by the following prohibition under article 16(4):

"There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State."

The Tunisian reservation was objected to by Australia, Denmark, Fiji, Israel, Japan, Madagascar, the Netherlands, Tonga, the United Kingdom and the United States.⁴³ Now the question whether passage through international straits may be suspended remains unregulated under the convention as between Tunisia and the ten objecting states. A way out of this dilemma

would be to prove that this norm is binding, irrespective of the Geneva Convention, as part of international customary law.⁴⁴

Reservations which 'exclude' compulsory disputes settlement by adjudication, arbitration, etc., constitute a special category of reservations which has to be considered separately from reservations to the material norms of a treaty. With respect to these remedial rules, existing as secondary norms of enforcement only in connection with the primary norms of conduct, the distinction between contraregulation and deregulation seems quite hard to draw. A state accepting the denial of compulsory adjudication by another state recognizes the liberty of this reserving state not to submit a dispute for settlement. A state objecting to such a denial does evidently not recognize the legal immunity of the reserving state, but is not in the position to compel that state to submit any dispute to adjudication.⁴⁵ A tribunal would not be able to consider a claim by the objecting state against the reserving state. Factual freedom of action appears to converge into legal immunity (or legal liberty). Nowadays objections to reservations concerning disputes settlement clauses are less common as the attitude to such reservations has become more tolerant. The fact that states to a large extent are not ready to accept compulsory jurisdiction of international tribunals is reflected by the many reservation clauses in more recent treaties which make express allowance for rejection of compulsory disputes settlement. In order to be meaningful an objection must be qualified by excluding also the substantive norms to which the remedial rules refer from applying between the reserving and the objecting state. Recent objections to reservations rejecting compulsory disputes settlement have been qualified in such a way so as to exclude even substantive provisions of the treaty from applying. Such qualified objections were made to the Tunisian and Syrian reservations to the disputes settlement procedures under the Vienna Convention on the Law of Treaties.⁴⁶ Where a state party considers a clause containing compulsory adjudication to be of fundamental importance for achieving the goals of the treaty, it will presumably construe a reservation to such a clause as incompatible with the object and purpose of the treaty. It is to be expected that the objecting state will qualify its objection to exclude parts of or the entire treaty from applying between itself and the reserver.⁴⁷

Some doubts may be expressed as to the rigidity of the minimum effect rule of the Vienna Convention. Is a simple and unspecified objection always to have the effect of only excluding the indicated provision from applying? According to the formulation of article 20(4)(b):

"... an objection does not preclude the entry into force of the treaty as between the objecting and the reserving States unless a contrary intention is definitely expressed by the objecting State."

Although the formulation "definitely expressed" speaks in favour of the understanding that the objecting state is bound to accept treaty relations with the reserving state if it has not clearly qualified its objection to exclude all treaty relations, it must be remembered that the preparatory work speaks of a rule of presumption. When an objection is not qualified there are good

reasons to believe that the objecting state acquiesces in the entry into operation of the treaty between it and the reserving state. The rule was not intended to be an absolute one.⁴⁸ There remains still a possibility for a state presenting a simple objection to prove that it did not have intentions of permitting treaty relations with the reserving state.⁴⁹

The inverted presumption will have the effect of transferring the burden of proof to the objecting state. The modified maximum effect rule obliged the reserving state to prove that the objection was not intended to preclude all relations under the treaty with the reserving state. The modified minimum effect rule now transfers the burden of proof to the objecting state, which has to prove that it intended to debar all treaty provisions from applying itself and the reserving state.

Treaty practice shows that objections usually do not specify their legal effects. Reservations are simply "objected to", "not accepted" or considered as "not being valid". In only a very few cases have the objections indicated the scope of their legal effects, excluding only the provision designated by the reservation or a part or the whole of the treaty from applying.

A delicate problem is the question of the non-retroactivity of the rule on the legal effects of objected reservations. As concerns the period from the advisory opinion of the ICJ in 1951 to the adoption of the Vienna Convention in 1969 the whole question of the legal effects of reservations dwelled in a state of uncertainty. The presumption of minimum effect was only introduced at the very end of the second session of the Vienna Conference. For the treaties concluded between the date of adoption of the Vienna Convention and the date of entry into force in 1980 the new presumption is but a standard. This standard may only be established as a legal norm on the basis of a general acquiescence among states. It is doubtful if this can be proved.

It is important to point out a certain subtleness in the wording of article 21(3) whereby "provisions to which the reservation relates do not apply as between the two States to the *extent* of the reservation" (emphasis added). This wording originally introduced in the 1965 draft which was abandoned by the Drafting Committee of the Vienna Conference and reintroduced by the above-mentioned four powers amendment is in need of elucidation.⁵⁰ The utterances of Kearney and Yasseen during the 2nd session of the Vienna Conference did not bring much light into the matter but had the sole effect of unveiling the complexity behind the formulation. Yasseen's restrictive understanding of the provision is certainly defective. A reservation does not only affect the provision to which it directly refers but may have repercussions on other provisions. An 'exclusion' of a provision, that is the introduction of an opposite norm, changes the context that is relevant for interpreting other norms. A norm seldom exists in isolation but forms an integrated part in a system of norms. The extent of a reservation does not necessarily comprise only the provision directly affected but also those provisions the application of which is influenced by the 'exclusion' or the 'modification'. Understanding the expression "to the extent of" in broad terms, provides also a basis for making a distinction between the acceptance and the objection to an excluding reservation. 'Excluding' a provision may have the indirect effect of altering the application of other provisions. An objection may thus have the effect of not

only abrogating the directly 'excluded' provisions but also the indirectly 'modified' provisions.

The result of such a broad conception on the legal effects of objections brings an uncertainty and uneasiness into treaty relations, a possibility clearly abhorred by the British delegate to the Vienna Conference, Vallat, who unmistakably alleged that either there should be no treaty relations at all between reserver and objector or that the treaty should operate in accordance with the advanced reservations. A situation where there was no certitude as to the effects of an objected reservation was not to be tolerated.⁵¹ This view is the result of an idealistic outlook on treaties as providing clearcut solutions to future problems. However, the reality is that treaties to only a limited extent provide ready answers to any dispute or question concerning the subject-matter under regulation. Treaties, as well as statutes, do not furnish cash and carry solutions to all problems but provide only the general framework within which there is room for divergent opinions, leaving the clarification on the bearing of the treaty provisions to a future meeting of minds. Naturally, reservations are always introducing a further uncertainty into the relations among the parties to the treaty. States confronted with a reservation will find it difficult to foresee all the legal effects a reservation will have. A certain legal effect of a reservation may for the first time be brought about in connection with a concrete dispute a long time after the reservation was notified and construed as tacitly accepted. Although it may be welcomed that objecting states specify the effects their objections are going to have on the operation of the treaty between itself and the reserving state, it cannot reasonably be required, as the objecting state will seldom find it possible to foresee all the potential legal effects of the reservation. The imprecise formulation of article 21(3) must be held to allow for an extensive deregulatory effect going beyond the reserved provision. This does not mean that the effects of an objection always have to be construed broadly. Naturally the intentions of the objecting state must be ascertained.⁵²

It may be a case of negligence that paragraphs 1 and 2, which concern the legal effects of accepted reservations, only speak of "modification" of the provisions to which the reservation relates not mentioning the case of 'exclusion'. In any case, this formulation is to be preferred to the one in the definition set forth in article 2(d). Article 21(3) states that "the provisions to which the reservation relates do not apply". Even an 'excluding reservation' as a rule is simply modifying certain norms of the treaty, but an objection has the effect of excluding them from operating altogether.

The sweeping assertion that there is no difference between the legal effects of a reservation accepted and a reservation to which a simple objection has been made unfounded. An objection will as stated above dissolve the legal and binding regulation of the subject-matter. Where a reserving state now acts in accordance with its reservation, this cannot be legally justified by referring to the norm system of the treaty. However, neither may it claim that an objecting state having opposed its measures has acted in violation of the treaty. If, for example, a Soviet government-owned commercial vessel is stopped and arrested on the high seas, as the result of hot pursuit by a US warship which suspects that it has violated US laws during its passage through the United

States territorial sea, and is then escorted to a US port for enquiry, the US government may not justify its action on the basis of the High Seas Convention and neither may the Soviet Union claim any violation of its rights under that convention. Between the Soviet Union having formulated a reservation to article 9 of the said convention extending complete immunity to government-owned commercial ships and the United States having objected to that reservation the dispute cannot be settled on the basis of the Geneva Convention on the High Seas

Within the Organization of American States the rule of the modified maximum effect as mentioned in resolution X from 1959 of the Inter-American Council of Jurists has been exchanged for the modified minimum effect rule harmonizing with the Vienna Convention regime. Section C paragraph 3 of the 1973 Standards provides for the presumption of treaty relations between reserving and objecting state where "the provisions affected by the reservation shall be inapplicable".⁵³

Where two reservations are intended to have opposite effects, one purports to enlarge a right and the other to restrict or abolish this right, they must be considered as simultaneous objections to each other. Article 62 of the Vienna Convention confirms the liberty to invoke a fundamental change of circumstances (the *rebus sic stantibus* principle) as a ground for terminating or suspending a treaty. Syria wanted to widen the scope of this liberty by not accepting that treaties establishing boundaries were exempted from the application of the principle:

"The Government of the Syrian Arab Republic does not in any case accept the non-applicability of the principle of a fundamental change of circumstances with regard to treaties establishing boundaries, referred to in article 62, paragraph 2 (a), inasmuch as it regards this as a flagrant violation of an obligatory norm which forms part of general international law and which recognizes the right of people to self-determination."⁵⁴

Chile was not willing to accept a general liberty to invoke fundamental change of circumstances as a ground for termination and suspension of treaties:

"The Republic of Chile declares its adherence to the general principle of the immutability of treaties, without prejudice to the right of States to stipulate, in particular, rules which modify this principle, and for this reason formulates a reservation relating to the provisions of article 62, paragraphs 1 and 3, of the Convention, which it considers inapplicable to Chile".⁵⁵

The effects of these two reservations in combination is to leave the whole question of fundamental circumstances unsettled in the relations between Chile and Syria.⁵⁶

CHAPTER 21

THE RELEVANCE OF THE RECIPROCITY PRINCIPLE AND THE INSTITUTION OF OBJECTIONS

The rule that reservations operate reciprocally, and should also benefit the confronted states, has been assumed to re-establish the balance of mutual obligations and rights which have been upset by the introduction of a reservation. The question may be asked whether or not the institution of objections turns out to be superfluous as the principle of reciprocity would safeguard the interests of the confronted states. As already shown, reciprocity may be impossible due to the nature of the treaty or the reservation itself.

Some may perhaps contend that the remedy of formal objection is not needed where the obligations, such as in the human rights treaties, are directed internally towards the individuals and where the reciprocity principle is not able to operate. However, such obligations are felt to be burdensome as they limit the freedom of action, and unjust if other states do not assume the same obligations. Confronted states must have the means to express their disagreement when other states try to disinvolve themselves from any of the obligations under the treaty.¹ Human rights treaties rarely operate mutually between participating states. Exceptionally, when this is the case, a reservation denies the claim-right for other state parties where a human right is denied. According to the reciprocity principle the reserving state would lose its claim-right in the case where a confronted state has violated the relevant human right. That is the situation where the reservation has been accepted.

If a confronted state has brought a claim on the basis of an adjudication clause against the reserving state alleging a violation of a norm that has been 'excluded' by a reservation, the court would have to reject the claim and decide in favour of the reserving state where the confronted state had accepted the reservation.² The derogation from the treaty norm cannot be construed as a violation of the treaty. Where the reserving state has presented a similar claim against the confronted state the court would not be able to consider the case because the reserving state would have no *locus standi*. What happens if the reservation is objected to? Because the subject-matter would be deregulated as between the reserving and the objecting state there would be no legal basis for either side to make use of a claim-right. The objecting state will not be able to profit from the remedial rules of the treaty. However, objections with respect to human rights treaties seldom occur. If this happens, the objecting state would have to declare the reservation to be incompatible and therefore void in order to make its objection meaningful.³

Even in the case where reciprocity would work, guaranteeing formally a balance of obligations, confronted states would often not be able to take advantage of it. They may still consider themselves as bound to fulfil the obligation due to the state of their internal legislation.

A confronted state may perhaps not appreciate benefiting from a reserva-

tion where this would be feasible. It may not experience the obligation as particularly burdensome, but instead believe it to have wholesome effects in the long run. The fact is that states do evaluate the necessity of obligations differently. A confronted state which profoundly disapproves of the move of a reserving state to deny a compulsory disputes settlement procedure, will hardly be satisfied by the knowledge that the reserving state will not be able to allege a binding jurisdiction in a dispute with itself. It would prefer that the reserving state would have an obligation to submit to the procedure instead of going free.⁴

The question may be asked whether an objection would satisfy the interests of a confronted state, in the case where the reciprocity effect of a reservation would not. As mentioned above an objection would in the case of a 'modifying reservation' have an effect that is clearly distinct from that of an acceptance. With respect to 'excluding reservations' certain writers have categorically contended that the legal effects of acceptance and objection are the same.⁵ That view is not shared in this paper, because an acceptance of a 'duty-excluding reservation' brings into force a legally relevant liberty of action, whereas an objection leaves the question legally unregulated (under the treaty). Where the treaty does not regulate the subject-matter, it may result in a factual freedom of action, a freedom which, however, cannot prevent the actions from being disputed. This is only one instance which proves that the system of international law is not a comprehensive and closed system. We have to live with the fact that there are a number of questions that fall outside the realm of international legal regulation. International law has at its disposal fewer devices than municipal law which could help to 'close' the norm system such as comprehensive rules of burden of proof, an extensive *in dubio pro reo* principle, etc.⁶ The non-regulation under international law may result in a *de facto* freedom of action. This depends very much on the nature of the relevant act, the powers and resources of the acting state, etc.⁷ However, such acts cannot be based on or lead to the assertion of certain legal rights and obligations. We find that the legal effects of an objection are the same irrespective of the reservation being either 'modifying' or 'excluding'.

A confronted state which is dissatisfied with a reservation must analyze what effects its reaction or non-reaction will have on its own position. If a confronted state comes to the conclusion that in spite of an objection it may not hinder the reserving state from profiting fully from the reservation, it may, in fact, be preferable not to make an objection. An objection makes it impossible for the reserving state to oppose the reservation to the objecting state. On the other hand, the objection debars the objecting state from invoking the reservation in its relations with the reserving state. A confronted state would in such a situation be worse off if it presents an objection than if it did not.⁸

If a confronted state has invoked the reservation against the reserving state it must be deemed to be an implicit acceptance *per factum concludens*.⁹ However, where an objecting state does this, there may be some doubts as to the correct judgement of the situation. Either the objecting state does not have any right to take advantage of the reservation or it may be considered to have withdrawn its objection in order to profit from the reservation. The latter case

seems less probable. It must be remembered that the Vienna Convention requires that withdrawal of a reservation has to fulfil certain formal requirements.¹⁰

When confronted with a reservation, a state has not only to evaluate the legal effects of the reservation, but also the legal effects of its own reaction. It may be difficult to foresee how acceptance or objection will satisfy its own interests in the future.¹¹ If a confronted state cannot predict all the consequences of a reservation accepted or objected to, it may be preferable to object. If the objection turns out to be more of an inconvenience than an advantage, it can always be withdrawn. Once a reservation has been accepted, this cannot be reversed. There is also the possibility to "reserve one's position", a solution that has been chosen by some states when in doubt.¹² In such a case the exact state of the legal relations as between the reserving state and the state reserving its position remains in suspense creating a certain amount of uncertainty.

CHAPTER 22

THE PRACTICE OF OBJECTING TO RESERVATIONS AND PROTESTING TO DECLARATIONS

22.1 DISAPPROVALS IN GENERAL TERMS

A confronted state may express its opposition to reservations or other declarations in abstract terms or in a more specified way. The first kind of general disapproval occurs when the confronted state does not refer to a specific statement by an individual state, but condemns all statements having a certain content or relating to certain provisions, both already formulated and those that will be formulated in the future. Such general objections or protests may relieve the confronted states from the need to show constant vigilance with regard to each statement made at whatever moment.¹ General objections are not abundant but they do appear from time to time. For example, Denmark, Egypt, Finland and Sweden made general objections with regard to any reservation which was to exclude the compulsory disputes settlement procedures as indicated by article 66 and the Annex of the Vienna Convention on the Law of Treaties.² Some states combined a general objection with an enumeration of those states having already formulated such reservations. This was the case with the objections by Japan, New Zealand and Sweden mentioning *en explicite* the reservations of Syria and Tunisia to the above-mentioned provisions of the Vienna Convention.³

It may occur that a state enters a general objection without any specifying component. Greece made such an objection when ratifying the Genocide Convention:

“We further declare that we have not accepted and do not accept any reservation which has already been made or which may hereafter be made by the countries which have acceded or may hereafter accede thereto.”⁴

Such objections are better avoided. No state can foresee the various reservations that may be formulated and doubts may always arise if the objecting state really wanted to oppose any later reservation which had not been envisaged at the moment of objection. It has also occurred that a confronted state has entered an objection to all past and future reservations that are incompatible with the object and purpose of the treaty without indicating what is meant by this. Israel made such an objection when ratifying the 1985 Convention on the High Seas.⁵ Other parties to the treaty will not find it easy to decide which reservations the objecting state finally considers to be incompatible.

22.2 INDIVIDUALIZED OBJECTIONS AND PROTESTS

A disapproving state may identify the statements it disagrees with by indicating only the states that have presented them. Such a method may in certain cases prove to be unsatisfactory. If we have a situation where a number of states have formulated similar reservations or declarations to the same provision, but the statement of one of these states comprises also a reservation or declaration which is missing from the statements of the other declaring states, uncertainty will ensue. Usually, a disapproval which is not specified as to its substance but only indicates the state behind the statement covers all parts of the statement. However, in the above-mentioned case it may be asked if the disapproving state had in mind to oppose only the part of the statement which was common to all the disapproved statements or every single reservation or declaration under it.

With respect to the 1949 Convention on Genocide, Australia and Brazil disapproved of the statements made by Bulgaria, Byelorussia, Czechoslovakia, Poland, Romania, Ukraine and the USSR and also of the statement of the Philippines.⁶ The socialist states had presented identical statements as they comprised a reservation to article IX on the compulsory jurisdiction of the ICJ, and a declaration concerning article XII being a territorial application clause permitting the optional extension of treaty obligations to non-self-governing territories. The Philippines statement was quite different; the only point in common with the other statement was the exclusion of the compulsory jurisdiction under article IX. It did not refer to the territorial application clause, but to article IV concerning the punishment of constitutionally responsible rulers, and article VII concerning the extradition of persons having committed acts of genocide. The disapproving states, Australia and Brazil, did not specify to which parts of the statements their opposition referred. In this case one may wonder if the formal disapproval only referred to the parts of the statements which were common, not affecting those relating to articles IV, VI and VII. Neither Australia nor Brazil disapproved of the statements by Algeria, Burma, Morocco and Venezuela relating to article VI and the statement of Venezuela as far as it affected article VII. The disapproval of the United Kingdom was more explicit and therefore more satisfactory. The UK not only referred to the statements by indicating the originators but specified them by enumerating the articles to which they related. The statement of disapproval by the UK covered the statements in their entirety thus opposing each reservation or declaration presented to articles IV, VII, VIII, IX and XII.⁷ The statements of Algeria, Burma, Morocco and Venezuela were explicitly mentioned.

22.3 SPECIFIED OBJECTIONS AND PROTESTS

On the whole disapprovals are sufficiently well specified. This may be the case when identifying the statement by mentioning the provisions to which it refers. Czechoslovakia reacted in the following way to the Argentinian statement to the 1956 Convention on the Recovery Abroad of Maintenance:

"The Government of the Czechoslovak Socialist Republic does not regard as valid the reservation to article 10 of the Convention ... made by the Government of Argentina."⁸

Or the statement may be identified according to its substance. New Zealand objected to the Syrian reservation to the Vienna Convention on the Law of Treaties in this way:

"... The New Zealand Government objects to the reservation entered by the Government of Syria to the obligatory conciliation procedures contained in the Annex of the Vienna Convention on the Law of Treaties and does not accept the entry into force of the Convention as between New Zealand and Syria."⁹

22.4 THE FREQUENCY OF OBJECTIONS AND PROTESTS

It is natural to ask if the institution of objections has been of as great importance for safeguarding the interests of the non-reserving states as assumed by the majority of the drafters of the Vienna Convention rules. The fact is that the number of reservations and of declarations is modest with respect to the total number of commitments. However, the number of objections and protests is even more insignificant.

With regard to those 262 treaties elaborated under the auspices of the United Nations and the League of Nations which are now deposited with the UN Secretary-General 164 treaties have become the object of 1522 statements of which 183 have met with formal disapproval. By a statement is meant any formal notification by a consenting state which contains one or more reservations and/or declarations.¹⁰ It must also be remembered that not all of these disapprovals are proper objections, because they do not relate to reservations but to declarations.

With regard to the conventions of the League of Nations deposited with the UN Secretary-General only four instances of disapproval of a statement have been recorded. The United Kingdom disapproved of four identical statements to the 1936 Convention Concerning the Use of Broadcasting in the Cause of Peace excluding the compulsory jurisdiction of the World Court under article 17 and declared that the convention would not "create formal commitments between countries which do not maintain diplomatic relations with each other".¹¹

Within the Organization of American States, where the flexible rule governed the operation of reservations, objections have been utterly rare. There is demonstrably only one recorded occasion where objection was made to a statement comprising reservations.¹² The Dominican Republic declared on ratifying the 1928 Havana Convention on Consular Agents that it did not approve of articles 12, 15, 16, 20 and 21, and made it clear that it interpreted "crime" as mentioned in article 14 in a broad sense including "delicts, crimes, and infractions" and the expression "criminal matters" mentioned in article 17 as including all "penal matters".¹³ The United States informed that it was not able to accept the Dominican reservations and declarations,

wherefore the treaty did not apply in the relations between the Dominican Republic and the United States giving its objection maximum effect.¹⁴

On 5 October 1961 the Dominican Republic notified the Pan American Union of its withdrawal of reservations to the articles 12, 15, 16, 18, 20 and 21.¹⁵ The State Department replied on 16 November 1961 that the United States would consider the convention to be in effect between the United States and the Dominican Republic as of 5 October 1961. The declarations to articles 14 and 17 were not affected.¹⁶ Although formal objections are very seldom resorted to, it has happened that more informal criticism has been directed against formulated reservations. Such a criticism was the cause of an intense debate in the 1950s on the question of reservation.¹⁷

Since the adoption of the new Standards on Reservations by the OAS Assembly in 1973 the former presumption for the exclusion of treaty relations (the maximum effect rule from 1938 and the modified maximum effect rule from 1959) has been replaced by the presumption for treaty relations (the modified minimum effect rule).¹⁸

Within the treaty system of the Council of Europe objections do not actualize. European Conventions as a rule have detailed reservation clauses which authorize the making of specific reservations and regulate their operation which does away with the need to object.¹⁹

With regard to treaties deposited with the UN Secretary-General the practice of expressing disapproval of reservations or declarations concentrates on statements made to certain treaties. A considerable number of statements does not correspond to a high amount of disapprovals. The following treaties provide cases with the highest ratio of statements disapproved and statements advanced. Highest ranks the 1958 Geneva Convention on the High Seas with the ratio of (15:16), i.e., 15 out of 16 statements have been disapproved of by one or more parties. The ten top ranking treaties are listed below:²⁰

(1) The 1958 Geneva Convention on the High Seas	14:14 (1,00)
(2) The 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone	14:16 (0,857)
(3) The 1948 Genocide Convention	20:23 (0,87)
(4) The 1961 Vienna Convention on Diplomatic Relations	22:32 (0,69)
(5) The 1946 Convention on the Privileges and Immunities of the United Nations	14:21 (0,67)
(6) The 1947 Convention on the Privileges and Immunities of the Specialized Agencies	14:22 (0,64)
(7) The 1958 Geneva Convention on the Continental Shelf	5:10 (0,5)
(8) The 1953 Convention on the Political Rights of Women	14:42 (0,33)
(9) The 1969 Vienna Convention on the Law of Treaties	5:15 (0,33)
(10) Constitution of the UN Industrial Development Organization	4:12 (0,33)

If, on the other hand, we want to look at the treaties from the point of how

many contracting parties have disapproved of these statements we get a different order. Now the Continental Shelf Convention tops the list. Where 10 states presented statements to the convention, 11 confronted states expressed their disagreement with these statements. With respect to the treaties where statements have been most intensely reacted upon we get the following order:

(1) The 1958 Geneva Convention on the Continental Shelf	11:10 (1,1)
(2) The 1958 Geneva Convention on the High Seas	13:14 (0,93)
(3) The 1969 Vienna Convention on the Law of Treaties	13:15 (0,87)
(4) The 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone	12:16 (0,75)
(5) The 1961 Vienna Convention on Diplomatic Relations	22:32 (0,69)
(6) The 1948 Genocide Convention	11:23 (0,48)
(7) The 1953 Convention on the Political Rights of Women	13:42 (0,31)
(8) The 1967 Protocol Relating to the Status of Refugees	7:25 (0,28)
(9) The 1950 Convention on the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others	3:14 (0,214)
(10) The 1963 Vienna Convention on Consular Relations	4:19 (0,21)

On the other hand we find a category of treaties where an impressive number of reservations and declarations has been advanced but where the reactions have been negligible. Thus for example, the 1966 Convention against Racial Discrimination has been the object of the impressive number of 45 statements.²¹ The only state to express its disapproval was Pakistan reacting to a reservation by India by which the latter excluded the compulsory jurisdiction of the ICJ as stipulated in article 22 and concerning disputes over the interpretation or application of the convention.²² The following treaties grouped according to subject-matter have experienced more than 20 statements but opposition to these statements has been rare:²³

(1) The 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents	(29:4)
(2) The 1966 Convention on the Elimination of All Forms of Racial Discrimination	(44:1)
(3) The 1966 Covenant on Economic, Social and Cultural Rights	(32:3)
(4) The 1966 Covenant on Civil and Political Rights	(37:4)
(5) The 1979 Convention against the Discrimination of Women	(45:2)
(6) The 1951 Convention on Refugees	(48:8)
(7) The 1967 Protocol on Refugees	(25:7)

(8) The 1954 Convention on Stateless Persons	(22:0)
(9) The 1961 Single Convention on Narcotic Drugs	(24:0)
(10) The 1971 Convention on Psychotropic Substances	(26:0)
(11) The 1949 Convention on Road Traffic	(43:2)
(12) The 1958 Road Traffic Convention	(25:0)
(13) The 1968 Convention on Road Signs and Signals	(25:0)
(14) The Convention on the International Maritime Organization ²⁴	(22:0)
(15) The 1958 Convention on the Recognition and Enforcement of Foreign Commercial Arbitration	(45:0)

Of these treaties those concerning road traffic and narcotic drugs did authorize reservations, thus limiting the incitement to make objections. The same is true of the 1958 Commercial Arbitration Convention, where the statements were nearly all formulated in accordance with the authorization under article 1 making it possible for a party not to apply the convention to awards given in the territory of a non-contracting state or to awards concerning a matter which is non-commercial according to the laws of the reserving state.²⁵ Most of the statements to the Convention for the Protection of Diplomatic Agents concerned the compulsory disputes settlement clause and were authorized under article 13(2).

It is symptomatic that the high number of reservations to treaties on humanitarian matters (human rights and refugees) does not correlate with the high number of disapprovals. The explanation for this may be that other states do not see their own interests as directly vitiated by reservations limiting another state's commitments towards its own nationals.²⁶ The 1948 Genocide Convention and the 1953 Convention on the Political Rights of Women are exceptions. However, in these cases objections were mostly directed against the reservations to the disputes settlement clauses. These two conventions belonged to the early treaties on human rights elaborated under the auspices of the United Nations. At this time the view was still widely shared that compulsory jurisdiction was a very crucial ingredient of these conventions and an absolute condition for participation in them. With respect to the Genocide Convention it was not clear if the disapproval was also directed towards the statements made to the territorial application clause. With respect to the Convention on the Political Rights of Women the disapproval also concerned the statements made to the reservation clause of the treaty. Article VII stated that the reservation which was objected to would have the effect of preventing all treaty relations between reserving and objecting state (i.e., the unmodified maximum effect rule). The socialist states participating in the treaty were not ready to accept the maximum effect rule and declared that an objection had only the effect of "excluding the provision" affected by the reservation letting other parts of the treaty remain operative between reserving and objecting state.²⁷ These statements and the reactions to them must be seen against the background of the views on how the law of treaties and of reservations was to be recognized. During the discussions on the reservations to the Genocide Convention in the VIth Committee of the United Nations General Assembly in 1950 the delegates of the socialist states advocated the

minimum effect rule and the right to *make* reservations, whereas the Western states still clung to the rule of unanimous consent. As the socialist states were not able to have their views reflected in the reservation clause of the 1953 Convention they naturally expressed their disagreement on ratification or accession. How are the relations between the reserving states and the objecting states to be evaluated in the light of the statement to article VII comprising the reservation clause? All socialist states having presented a reservation to the clause on the compulsory jurisdiction in article IX had also presented a statement in favour of the minimum effect rule which was contravening the reservation clause in article VII. If article VII was to apply, treaty relations would not exist between states denying the compulsory jurisdiction of the ICJ and the objecting states. However, if the statement of the socialist states to article VII on reservations was itself construed as a reservation it would have the effect of introducing the minimum effect rule instead of the maximum effect rule. A state accepting this statement would accept treaty relations with a state presenting a reservation to article IX to which it is itself objecting. In the case when a state objecting to the reservation to article IX also disapproves of the statement to the reservation clause we are faced with a peculiar situation where neither the maximum nor the minimum effect rule is binding. However, in practice an objecting state cannot be forced to enter into treaty relations with a state which enters a reservation to which it objects strongly. This is also in line with the modified minimum effect rule which was later to become the authoritative one. One way out of the dilemma would be to regard the statements to the reservation clause as purely political in nature and directed more towards the ongoing codification of the law of treaties where the elaboration of the reservation regime was still in its beginnings. Article VII would thus be operative in spite of the statements made to it. The whole dispute must be seen as being of a theoretical nature, because the convention operates in the first place between the state parties and their subjects and not mutually between the states themselves.²⁸

The Secretary-General of the UN assumed article VII to be applicable. Albania and Romania had denied the compulsory jurisdiction of the ICJ under article IX and expressed their disagreement with the reservation clause under article VII. On receiving the instrument of ratification by the Philippines containing a formal rejection of these statements the Secretary-General announced:

“In accordance with Article VII, the Convention is not in force as between the Philippines and Albania and Romania, the Philippines having notified the Secretary-General that it does not accept the reservations made by the said States.”²⁹

The question arises if the Secretary-General acted against UN General Assembly resolution 589(VI) 1952 requesting the Secretary-General not to pass upon the legal effect of reservations and objections.³⁰

Opposition to reservations to clauses on compulsory jurisdiction was very marked in the 1950s when many states still believed it to be possible to realize an effective adjudication and enforcement machinery. Opposition to such

reservations has weakened over the years as the insight has come more and more that the time is not yet ripe for a generally accepted compulsory disputes settlement. More recent treaties frequently permit reservations to compulsory jurisdiction clauses and often such reservations are the only ones permitted.³¹ Another way out is to elaborate an optional protocol on the compulsory settlement of disputes.³²

22.5 INCONSISTENCY IN DISAPPROVAL PRACTICE

Confronted states seldom resort to general objections or protests where only the material contents of the envisaged reservations are mentioned thus covering any reservation of such a kind irrespective of when and by whom it is presented. Nowadays disapprovals are mostly individualized, they identify the relevant statement by the name of its originator. Frequently identical or similar statements are presented by a number of states. Disapproving states must therefore be vigilant so as not to miss one of them.

Where several parties have made statements with an identical bearing it would seem natural that a confronted state disapproving of one would also disapprove of all the others. Frequently this is not the case. Thus identical reservations were made to different provisions of the 1961 Diplomatic Relations Convention. A closer look at the practice of objections and protests will show that reactions were not always consistent. To illustrate this we may choose three categories of reservations which were common. The first category consists of the reservations to article 11 of the Diplomatic Relations Convention according to which a receiving state in absence of an agreement could require the size of a mission to be kept within reasonable and normal limits and refuse to accept on a non-discriminatory basis officials of a certain category. The second comprises reservations formulated to article 27(3) and (4), concerning the inviolability of the official correspondence and the diplomatic bag, and the third those reservations formulated to article 37(2) concerning the privileges and immunities of the administrative and technical staff. Seven socialist states presented reservations to the provision on the size of missions and four Arab states presented reservations to the provisions on the diplomatic bag. Altogether 25 states objected to reservations to one or more of these provisions but it seldom occurred that objections were entered against all reservations having identical content.

Table 1 shows that we have some consistent objectors such as the United Kingdom, Canada and Australia. The other objecting states have all followed an identical pattern of objecting to all reservations that have been communicated before their own ratification, but not objecting to reservations that were notified after this date. It seems that once a state has undertaken all necessary steps to give its final consent to participation in the treaty it often loses interest in subsequently notified reservations.³³

With regard to the reservations concerning the diplomatic pouch (Table 2), objection practice shows a certain variety. The unacceptability of reservations denying the inviolability of the diplomatic bag was actualized in connection with the Bahraini reservation. The earlier Kuwaiti reservation seemed to have

Table 1. Objections to reservations concerning art. 11(1) (size of missions)

obj.	res.	USSR 25.03.54r	Byelorussia 14.05.64r	Ukraine 12.06.64r	Mongolia 05.01.67a	Bulgaria 17.01.68r	GDR 02.02.73a	Dem. Yemen 24.11.76a
Tanzania								
05.11.62r		22.06.64	-	-	-	-	-	-
UK								
01.09.64r	r	r	r	r	07.06.67	29.03.68	16.04.73	04.02.77
FRG								
11.11.64r	r	r	r	r	10.05.67	09.07.68	25.09.74	04.03.77
Canada								
26.05.66r	r	r	r	r	16.03.78	16.03.78	16.03.78	16.03.78
Luxembourg								
17.08.66r		18.01.65	18.01.65	18.01.65	-	-	-	-
Malta								
07.03.67d	d	d	d	d	-	-	-	-
Australia								
26.01.68r		14.03.68	14.03.68	14.03.68	14.03.68	-	06.09.73	21.06.78
Belgium								
02.05.68r	r	r	r	r	r	-	-	-
Denmark								
02.10.68r	r	r	r	r	r	r	-	-
Greece								
16.07.70r	r	r	r	r	r	r	-	-
New Zealand								
23.09.70r	r	r	r	r	r	r	-	-
France								
31.12.70r	r	r	r	r	r	r	-	-
Tonga								
31.01.73d	d	d	d	d	d	d	-	-
Bahamas								
17.03.77d	d	d	d	d	d	d	d	-
Netherlands								
07.09.84	r	r	r	r	r	r	r	r
Thailand								
23.01.85r	r	r	r	r	r	r	r	r

The table shows at what moment objections have been made. a = date of accession, d = date of succession or devolution, r = date of ratification.

Table 2. Objections to reservations concerning article 27(2) and (3) (diplomatic pouch and correspondence)

obj. \ res.	Kuwait 23.07.69a	Bahrain 02.11.71a	Libya 07.06.77a	Saudi Arabia 10.02.81a
Czechoslovakia 24.05.63r	—	19.01.72	28.10.77	—
USSR ³⁴ 25.03.64r	—	06.06.72	07.11.77	16.02.82
Ukraine 12.06.64r	—	28.07.72	—	—
UK 01.09.64r	—	13.03.73	—	—
FRG 11.11.64r	—	04.02.75	19.09.77	15.05.81
Poland 19.04.65r	—	03.11.75	07.03.78	—
Hungary 24.09.65r	—	07.07.75	—	—
Canada 26.05.66r	16.03.78	16.03.78	16.03.78	—
Mongolia 05.01.67a	—	18.01.78	—	—
Bulgaria 17.01.68r	—	22.09.72	18.08.77	23.06.81
France 31.12.70r	r	—	—	—
USA 13.11.72r	02.07.74	02.07.74	—	—
Haiti 02.02.78a	—	02.07.74	—	—
Australia 26.01.68	22.02.83	22.02.83	22.02.83	22.02.83
Netherlands 07.09.84	r	r	r	r
Thailand 23.01.85r	—	r	—	—

passed largely without special notice, as only Australia, Canada, France, the Netherlands and the United States presented objections. In this case objections were not as clearly concentrated on reservations which had been formulated before the date of ratification by the objecting state. Only with respect to France and the United States were objections not made to reservations that had been notified after the date of ratification by these two states.

With respect to article 37(2) on the privileges of the administrative and technical personnel (Table 3), 13 states had pending their statements with regard to this provision. Of these, 5 states (Botswana, Iraq, Libya, Malta, Sudan) declared that they would grant privileges and immunities mentioned by the provision only on the basis of reciprocity and one state (Viet Nam) declared that the status of this personnel should be determined on the basis of an agreement. The statement on reciprocity does not really count as a reservation as the whole norm system of the treaty is based on the idea of reciprocity. The statement by Viet Nam by which it declared that the "degree of privileges and immunities accorded to the administrative and technical staff and the members of their families . . . should be agreed upon in detail by the concerned States" is to be seen as a pure declaration of interpretation not derogating from the norms under article 37. These statements were not reacted upon except that the FRG did disapprove of the Sudanese and Vietnamese statements, and the Netherlands of the Maltese statement whilst not reacting upon the other. The statements by the following seven states did amount to proper reservations as they denied the obligation to confer privileges and immunities to the relevant group of individuals.

The Ecuadorian and Greek reservations on signature were not objected to although four respectively ten states had ratified the convention before it became clear that the reservations were abandoned in connection with ratification. Actually, there is no need to react to reservations presented on signature as the date for their confirmation in connection with ratification is decisive for determining if and when they are tacitly accepted. Only the UK, the FRG, Australia and the Netherlands were consistent in their objections, objecting to all reservations. The Bahamas and Tonga succeeded to the objections entered into by the United Kingdom, but failed to react independently to the reservations formulated after the date of devolution or succession to the UK objections. A mishap occurred in connection with the succession of Tonga to the UK objections, as Tonga apparently overlooked that Portugal had already withdrawn its reservation in June 1972.³⁵ It is interesting that Greece having itself formulated a restricting reservation to article 37(2) on signature, objected to reservations by other states to that same paragraph simultaneously with abandoning its own reservations.³⁶ Ten of the fourteen objecting states objected to the reservation by the People's Republic of China. The People's Republic finally withdrew its reservation, probably due to the compact opposition to its reservation.³⁷ This was the only reservation to which the socialist states had objected.

The same inconsistency in objecting may be noticed with regard to other treaties such as the 1958 Law of the Sea Conventions, the Genocide Convention and the Political Rights of Women Convention. In certain cases the discontinuation of objecting to similar reservations may be explained by the

Table 3. Objections to reservations concerning article 37(2) (status of administrative and technical personnel)

obj.	res.	Ecuador	Greece	Egypt	Kampuchea	Morocco	Portugal	China, P.R.
		18.04.61rs 21.09.64ra	29.03.62rs 16.07.70ra	09.06.64r	31.08.65a	19.06.68a	11.09.68a 01.06.72w	25.11.75a 15.09.80w
Czechoslovakia								
24.05.63r	—	—	—	—	—	—	—	12.12.77
USSR								
25.03.64r	—	—	—	—	—	—	—	24.10.77
Byelorussia								
14.05.64r	—	—	—	—	—	—	—	02.11.77
Ukraine								
12.06.64r	—	—	—	—	—	—	—	24.10.77
UK								
01.09.64r	—	—	r	19.06.68	23.08.68	10.12.68	25.01.77	
FRG								
11.11.64r	—	—	16.03.67	16.03.67	23.12.68	23.12.68	06.05.77	
Hungary								
24.09.65r	—	—	—	—	—	—	06.09.78	
Mongolia								
05.01.67a	—	—	—	—	—	—	18.01.78	
Ireland								
10.05.67r	—	—	—	—	—	—	17.01.78	
Australia								
26.01.68r	—	—	14.03.68	14.03.68	20.11.70	20.11.70	25.01.77	
Greece								
16.07.70	—	—	r	r	r	r	—	
USA								
13.11.72r	—	—	02.07.74	02.07.74	02.07.74	—	—	
Tonga								
31.01.73d	—	—	d	d	d	d	—	
Bahamas								
17.03.77d	—	—	d	d	d	d	—	
Netherlands								
07.09.84a	—	—	r	r	r	—	—	
Thailand								
23.01.85	—	—	r	r	r	—	—	

Ecuador and Greece presented reservations on signature (rs) which were abandoned on ratification (ra). Portugal formulated a reservation on accession but withdrew it four years later (w).

gradual acquiescence in such reservations. This is certainly the case with the reservations that were presented to the Genocide Convention and the Political Rights of Women Convention. Objections and protests were numerous which must be seen against the background of the profound reassessment of the whole reservation regime that suddenly sprang up in the beginning of the 1950s. As the support for a flexible reservation regime came to be more widespread, and because a considerable number of states was not ready to accept any forms of compulsory disputes settlement, it was felt less and less opportune to react negatively to such reservations. However, this had not resulted in the withdrawal of old objections.

Inconsistency in objecting is partly due to the strenuousness of constantly keeping an eye on all actions taken with respect to treaties to which one has consented. A way to cope with this problem of closely following all actions taken by other states, is, as mentioned earlier, to present general objections. Of course, one should avoid making completely unspecified objections as was the case with Greece to the Genocide Convention.³⁸ Some general objections are concretized by exemplification. Israel, Japan and Madagascar presented general disapprovals to all reservations and declarations to the 1958 Convention on the Territorial Sea and the High Seas presented on signing, acceding or ratifying specifying their objections and protests by naming the states that had formulated such unacceptable statements. Israel exemplified its disapproval by mentioning in particular the reservation of Tunisia to article 16(4) of the Territorial Sea Convention guaranteeing the free passage through international straits. The Israeli disapproval would thus encompass all reservations having been or to be formulated to this provision. Japan and Madagascar specified their precise disapproval by referring to specific reservations formulated by a group of socialist states, which would signify that they objected to any reservation that was formulated to articles 19, 20 and the corresponding article 21 of the Territorial Sea Convention and which concerned the immunity of government ships from criminal and civil jurisdiction of another state.³⁹ Japan also specified its objection by mentioning the articles affected by the socialist states' reservations, i.e., articles 19, 20 and 21.⁴⁰ This was not done by Madagascar who only identified the undesired reservations by some of its originators. Its objections seem therefore to have encompassed the reservations to article 23, which assert the right and liberty of the reserving state to require prior authorization for foreign warships desiring to pass through the territorial sea.

With regard to statements concerning the High Seas Convention, Israel did not specify its disapproval. Japan clarified its general disapproval by naming the states behind these statements and indicating the articles concerned. It may therefore be assumed that Japan would not accept any later reservation formulated to article 9 concerning the jurisdiction over foreign commercial government ships on the high seas and to articles 2 and 26(2) concerning the freedom to lay submarine cables and pipelines on the ocean floor including the floor of the continental shelf.⁴¹ Madagascar mentioned only the names of the states whose statements were unacceptable. The presumption is that all, even subsequent, reservations to article 9 have been objected to.⁴² Doubts may arise if Madagascar also disapproves of the declarations by these states to

article 15 on piracy. These declarations are actually only interpretative, but some states informed that they were not in favour of them.⁴³ Although the disapprovals by Israel and Madagascar would safeguard consistency of reaction with regard to statements sufficiently individualized, they are not entirely satisfactory. They still leave some doubt as to their scope. The question remains if they really intended to oppose any statement of whatever content.⁴⁴

The general objections that were made in connection with certain reservations to the Vienna Convention on the Law of Treaties were more satisfactory. Here the objections were sufficiently clarified by indicating the substance of the reservations with or without naming the states that had formulated them.⁴⁵ They met the needs of both clarity and consistency.

22.6 THE STATES MOST ACTIVE IN OBJECTING OR PROTESTING

On the basis of the material gathered by the Secretary-General of the United Nations on the statements and the corresponding formal reactions concerning treaties deposited with him, the following table has been elaborated to show how active the various contracting states have been in expressing their disapproval to statements, be they reservations or declarations. The figures comprise each separate formal disapproval. This means that any new instance where a statement is disapproved of is counted even if another identical statement has been earlier disapproved.⁴⁶

(1) UK	107	(30) Czechoslovakia	6
(2) Netherlands	67	(31) EEC	6
(3) FRG	49	(32) Mexico	5
(4) Australia	47	(33) USSR	5
(5) Denmark	47	(34) Bulgaria	4
(6) USA	39	(35) Philippines	4
(7) Fiji	34	(36) Argentina	3
(8) Tonga	33	(37) Haiti	3
(9) Thailand	32	(38) Ireland	3
(10) Canada	27	(39) Malta	3
(11) Japan	24	(40) Poland	3
(12) Belgium	21	(41) Ukraine	3
(13) France	20	(42) Byelorussia	2
(14) China, Republic of	19	(43) Chile	2
(15) Madagascar	18	(44) Hungary	2
(16) Italy	15	(45) Mongolia	2
(17) Israel	13	(46) Portugal	2
(18) Norway	13	(47) South Africa	2
(19) Pakistan	13	(48) Tanzania	2
(20) Sweden	13	(49) Viet Nam	2
(21) New Zealand	12	(50) Yugoslavia	2
(22) Bahamas	11	(51) Dominican Rep.	1
(23) Ethiopia	11	(52) Egypt	1
(24) Greece	11	(53) Finland	1
(25) Switzerland	10	(54) Guatemala	1
(26) Luxembourg	9	(55) Korea, Republic of	1
(27) Brazil	8	(56) Lebanon	1
(28) Cuba	7	(57) Spain	1
(29) Ecuador	7	(58) Sri Lanka	1

We find that the United Kingdom clearly emerges as the most active in opposing reservations and declarations. Together with the Netherlands, the USA, Denmark and the FRG it belongs to the group of 'active objectors'. Other states belonging to the British Commonwealth such as Australia, Canada, Fiji and Tonga have also been quite keen on presenting formal disapprovals. Tonga and Fiji succeeded to the objections and protests that had been made by the United Kingdom, but they initiated no objection.⁴⁷ Latin American states have not been very active in expressing formal disapproval of statements by other contracting states, Argentina clearly being an exception. Objections and protests are not common within the regional treaty practice of the members of the OAS. Amongst the Asian states only Japan, Thailand and China (the Republic of) have been reacting with more frequency, and among the African states only Ethiopia. The East European socialist states have remained relatively passive which is in line with their tolerant view on reservations. Nearly all of their disapprovals concerned reservations and declarations presented to the Convention on Diplomatic Relations. Among the Nordic countries Denmark excels in reacting to undesirable statements, whereas Norway and Sweden are moderate objectors and Finland remarkably passive, having made only one objection of a general nature in connection with the ratification of the Vienna Convention on the Law of Treaties.⁴⁸

22.7 THE STATES WHOSE STATEMENTS HAVE MOST FREQUENTLY BEEN REACTED UPON

There appears to be some pattern with respect to those states which most often encounter objections and other kinds of reactions to their statements.

(1) USSR	67	(35) Saudi Arabia	4
(2) Bulgaria	69	(36) Algeria	3
(3) Byelorussia	57	(37) Colombia	3
(4) Ukraine	54	(38) Cuba	3
(5) Romania	48	(39) Burma	2
(6) Czechoslovakia	40	(40) Bangladesh	2
(7) Hungary	39	(41) Congo	2
(8) Poland	32	(42) FRG	2
(9) GDR	31	(43) Jamaica	2
(10) Albania	23	(44) Korea, Rep. of	2
(11) Iran	20	(45) Mauritius	2
(12) Mexico	20	(46) Somalia	2
(13) Egypt	19	(47) Trinidad	2
(14) Mongolia	19	(48) USA	2
(15) Morocco	18	(49) Viet Nam	2
(16) Bahrain	17	(50) Afghanistan	1
(17) China, People's Rep.	17	(51) Australia	1
(18) Tunisia	17	(52) Brazil	1
(19) Guatemala	16	(53) Canada	1
(20) Kampuchea	14	(54) Finland	1
(21) Indonesia	13	(55) Malta	1
(22) France	11	(56) Nepal	1
(23) Venezuela	10	(57) New Zealand	1

(24)	India	9	(58)	Rwanda	1
(25)	Philippines	9	(59)	Spain	1
(26)	Portugal	9	(60)	Sudan	1
(27)	Syria	9	(61)	Turkey	1
(28)	Libya	8			
(29)	Democratic Yemen	6			
(30)	Argentina	5			
(31)	Burundi	4			
(32)	Iraq	4			
(33)	Kuwait	4			
(34)	Italy	4			

The USSR tops the list and is the state whose reservations and declarations have met with the most opposition. Nine of the states at the top of the list belong to the socialist group. They account for about 55% of all statements disapproved. This may have been brought about by the fact that socialist states to a large extent have formulated reservations to the compulsory jurisdiction of arbitration clauses, which especially in the group of Western states used to cause heavy resistance. However, if we eliminate all the objections that have been made to reservations denying the compulsory disputes settlement procedures we get the following outline:

(1)	USSR	61	(31)	Burundi	4
(2)	Byelorussia	52	(32)	Iraq	4
(3)	Ukraine	52	(33)	Italy	4
(4)	Bulgaria	50	(34)	Kuwait	4
(5)	Romania	39	(35)	Saudi Arabia	4
(6)	Czechoslovakia	38	(36)	Colombia	3
(7)	Hungary	30	(37)	Algeria	2
(8)	Poland	29	(38)	Bangladesh	2
(9)	Albania	22	(39)	Burma	2
(10)	Mexico	20	(40)	Congo	2
(11)	Egypt	19	(41)	Cuba	2
(12)	GDR	19	(42)	FRG	2
(13)	Iran	18	(43)	Jamaica	2
(14)	Morocco	18	(44)	Korea, Rep. of	2
(15)	Bahrain	17	(45)	Mauritius	2
(16)	Mongolia	17	(46)	Somalia	2
(17)	Guatemala	16	(47)	Trinidad	2
(18)	China, People's Rep.	14	(48)	USA	2
(19)	Kampuchea	14	(49)	Viet Nam	2
(20)	Indonesia	13	(50)	Australia	1
(21)	Tunisia	11	(51)	Brazil	1
(22)	France	11	(52)	Canada	1
(23)	Philippines	9	(53)	Finland	1
(24)	Venezuela	9	(54)	Malta	1
(25)	Portugal	9	(55)	Nepal	1
(26)	Libya	8	(56)	New Zealand	1
(27)	India	6	(57)	Spain	1
(28)	Syria	6	(58)	Sudan	1
(29)	Democratic Yemen	6	(59)	Turkey	1
(30)	Argentina	5			

Only disapprovals of statements concerning exclusively disputes settlement procedures have been left out. Disapprovals of statements which beside 'excluding' disputes settlement clauses do also bear upon other provisions have been counted. This is for example the case of the formal reactions to the statements to the Genocide Convention which concerned both the ICJ clause and the clause on territorial application.

We have to recognize that this operation does not greatly affect the profile of disapproval practice. The statements of the socialist states still remain the most commonly reacted upon.

22.8 THE KIND OF STATEMENTS MOST COMMONLY MEETING WITH DISAPPROVAL

Any numerical presentation of statements most commonly disapproved of will be distorted by the fact that we have two different kinds of norms. Some norms have become standardized and they recur in a large variety of treaties, mostly forming part of the final clauses. Standardized norms or clauses may, due to their regular appearance, become the object of a larger number of statements and consequently these statements are susceptible to a larger number of disapprovals. Norms that belong to the substantive provisions of a treaty are usually specific to the treaty and as such unique. Naturally these individual norms will hardly face the same number of statements as do the standardized rules, nor a correspondingly large number of disapprovals. In view of this fact the frequency of disapprovals will be looked at separately with regard to standardized norms and individual, substantive norms.

22.8.1 Reactions to statements on standardized norms

Standardized norms or clauses which have been affected by statements relate to the settlement of disputes, participation in the treaty, its territorial application and finally the formulation and operation of reservations. The last column of the following presentation indicates the amount of formal disapprovals of statements to these four categories of clauses:

	Number of treaties affected by dis- approvals*	Number of state- ments**	Number of states reac- ting***	Total number of disapprovals
Statements relating to:				
1. Disputes settlement clauses	65/13	455	51	243 (+ 3 general)
2. Reservation clauses	2/1	12	10	75
3. Participa- tion clauses	42/3	172	4	7
4. Territorial clauses	41/2	132	10	60 (+ 1 general)

* The first number stands for those treaties having a clause to which some kind of statement has been made, the second one stands for those treaties having a clause to which a statement has been made and which statement has met with disapproval.

** Comprises all statements irrespective of the fact that they may be identical and presented by the same state but to different treaties, and of the fact that they are identical and presented to the same treaty but by different states.

*** These figures are based on the reactions per statement and treaty. A state disapproving of identical statements to different treaties is counted more than once.

By far the largest number of statements and of disapprovals related thereto affect the disputes settlement clauses. Although these clauses are often considered to be technical ones and not to constitute the substantive rules of the treaty, statements bearing upon them are generally held to be true reservations.⁴⁹ Statements on territorial application and on participation hardly 'exclude' or 'restrict' the operation of particular treaty norms but affect the operation of the whole norm system of the treaty *ratione loci* or *ratione personae*.⁵⁰ These statements are predominantly made by socialist states which have preferred to call them "declarations" in contradistinction to their statements on disputes settlement procedure designated as "reservations". The confronted states seem to have considered these statements to be declarations of opinion. Luxembourg, Guatemala and South Korea were the only states that disapproved of statements to participation clauses.⁵¹ The disapprovals of statements criticizing territorial application clauses nearly all accompany the more crucial disapprovals of the reservations to the disputes settlement clause under the Genocide Convention. These categoric reactions must be seen in the light of the major dispute over the reservation rules in the beginning of the 1950s. Most reacting states made no distinction between the various parts of the statements.⁵²

Disapproval of statements designated as "reservations" which concerned reservation clauses had occurred in connection with the ratifications and accessions to the 1953 Convention on the Political Rights of Women. This clause stipulated that an objection to a reservation should have the effect of excluding all treaty relations between reserver and objector.⁵³ The states behind these statements had all advocated the opposite rule of minimum effect in the UN General Assembly and the International Law Commission. As in the case of the Genocide Convention the disapproval was simultaneously directed against the reservation to the ICJ clause.⁵⁴ The only other occasion where a statement had referred to a reservation clause was when Italy on signing the 1979 International Convention Against the Taking of Hostages declared that it would invoke article 19 of the Vienna Convention "due to the different interpretations to which certain formulations in the text lend themselves".⁵⁵ Article 16(2) of the Hostages Convention contains a reservation clause which states only that the compulsory arbitration under article 16(1) may be 'excluded' by a reservation stating nothing about the admissibility of other reservations. In its statement Italy informed that it would probably formulate reservations not envisaged by article 16(2) which is certainly not contradicting article 19 of the Vienna Convention. The statement must be seen as simply being of a declaratory character and therefore it is no wonder that it did not cause any comments by the other states. Another thing altogether is that Italy actually notified its intention to present later, at the time of ratification, interpretative declarations to certain imprecise formulations in the treaty text.

22.8.2 Reactions to statements on particular substantive norms

When we come to statements concerning norms specific to the treaty, their number decreases as does the number of disapprovals. The following are the treaties where statements have met with three or more disapprovals:

1. The Vienna Convention on Diplomatic Relations (VDR)
2. The Vienna Convention on Consular Relations (VCR)
3. The Geneva Convention on the Territorial Sea and the Contiguous Zone (GTS)
4. The Geneva Convention on the High Seas (GHS)
5. The Geneva Convention on the Continental Shelf (GCS)
6. The Vienna Convention on the Law of Treaties (LOT)
7. The Convention on the International Maritime Organization (IMOC)
8. The Genocide Convention (GC)
9. The Convention on the Political Rights of Women (CPRW)
10. The Covenant on Economic, Social and Cultural Rights (CESCR)
11. The Covenant on Civil and Political Rights (CCPR)
12. The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents (CIPP)

The table below indicates the frequency of reactions by confronted states against statements presented by one or more contracting states (column C shows how many individual disapprovals have been communicated):

	A Treaty provision concerned	B Number of statements	C Number of states reacting	D Total number of disapprovals
1. Diplomatic status of admin. + technical personnel	VDR 37	13* (5 reciprocity) (1 agreement)	21	66
2. Inviolability of dipl. pouch	VDR 27(3)	4	18	31
3. Size of diplomatic missions	VDR 11(1)	7	16	84
4. Immunity from criminal jurisdiction of gov. ships in territorial waters	GTS 19/21	9	11	67
5. Immunity from civil jurisdiction of gov. ships in territorial waters	GTS 20/21	3	11	23
6. Immunity of gov. non-commercial ships on the high seas	GHS 9	11	10	96

	A Treaty provision concerned	B Number of statements	C Number of states reacting	D Total number of disapprovals
7. Disputes Settlement	LOT 66 + Annex	2	10	13 (+ 3 general)
8. Delimitation of the continental shelf	GCS 6	6**	10	11
9. Innocent pas- sage through straits	GTS 16(4)	1	10	10
10. Freedom of exploring the conti- nental shelf	GCS 5	2***	8	10
11. Right to lay submarine cables	GHS 26(2)	1	7	7
12. Freedom of the high seas	GHS 2	1	7	7
13. Duty not to impede the laying of cables	GCS 4	1	6	6
14. Delimitation of territo- rial sea	GTS 12	1	6	6
15. Delimitation of contiguous zone	GTS 24	1	6	6
16. General aims of IMO	IMOC 1	6	5	9
17. Innocent pas- sage of ships belonging to non-coastal states	GTS 14	1	5	5
18. Free transit for land- locked states	GHS 3	1	5	5
19. Right of land-locked states to sail ships under own flag	GHS 4	1	5	5
20. Definition of conti- nental shelf	GCS 1	1	5	5
21. Right of innocent passage through the terr. sea	GTS 14	2	5	5

	A Treaty provision concerned	B Number of statements	C Number of states reacting	D Total number of disapprovals
22. Innocent passage of warships through the terr. sea	GTS 23	8	4	30
23. Exemption from taxes for honorary consuls	VCR 62	2	4	6
24. Exemption from registr. for honorary consuls	VCR 65	2	4	4
25. Reserving jurisdiction for nat. courts	GC VI	4	4	4
26. Exemption from taxes for consuls	VCR 46	1	4	4
27. Exemption from registr. for consuls	VCR 49	1	4	4
28. Responsibility of head of state	GC VI	1	4	4
29. Constitutional limitations to political rights of women	CPRW I, II + III	1	4	4
30. Right to lay cables	GCS 4	1	4	4
31. Invalidity of treaties due to coercion of state	LOT 52	1	4	4
32. Category of persons internationally protected	CIPP 1(1)(b)	1	4	4
33. Extradition under CIPP	CIPP 6(2)	1	4	4
34. <i>Rebus sic stantibus</i> principle	LOT 62(2)	3	3	5
35. Definition of piracy	GHS 15	11	3	29
36. Rights of coastal state in contiguous zone	GTS 24(1)	1	3	3

	A Treaty provision concerned	B Number of statements	C Number of states reacting	D Total number of disapprovals
37. Concept of self-deter- mination	CESCR 2	1	3	3
38. Concept of self-deter- mination	CCPR 2	1	3	3

*Statements are not completely identical. Some concerned the entire article: Botswana (condition of reciprocity). Some 'exclude' 37(2) only: Kampuchea, Egypt, Morocco; others apply this para. on condition of reciprocity: Iraq, Malta, Sudan, or require a more specific agreement: Viet Nam. Some apply only 27(3) on the conditions of reciprocity: Libya. The People's Republic of China 'excluded' paragraphs 2, 3 and 4 of article 37 from applying.

**None of the statements were identical. France, Venezuela and Yugoslavia indicated if there were to be present "Special circumstances" in a certain area or not.

***France and the FRG made different statements concerned with the understanding of separate aspects of article 5.

Certain of the reservations or declarations were closely interrelated such as the reservation on signature by Iran of the Convention on the High Seas denying the right under article 26(2) to lay cables and limiting the freedoms of the sea under article 2. It was then not surprising that the same states which opposed the reservation to article 26(2) also rejected the reservation to article 2. Czechoslovakia and Hungary referred in their statements to both article 14 concerning the general provisions on the right to innocent passage through the territorial waters of foreign states and article 23 concerning the non-compliance of warships with regulations of the coastal state whereby they required special authorization for warships to pass through territorial waters.⁵⁶ On the other hand, the statements by other socialist states were only referring to article 23, but had actually the same bearing and expressed identical reservations.⁵⁷ Venezuela was not ready to accept the rules under article 12 of the Convention on the Territorial Sea regarding the delimitation of the territorial sea between two adjacent or two opposite states. The Venezuelan government considered it to be consistent to make a similar reference to article 24 concerning the delimitation of the contiguous zone in similar cases. Consequently disapproving states directed their objections to both parts of the Venezuelan statement.⁵⁸

22.9 THE TIME WITHIN WHICH STATES HAVE EXPRESSED THEIR DISAPPROVAL

As mentioned above the Vienna Convention has settled for a period of 12 months within which confronted states ought to object in order to avoid their passivity being construed as tacit acceptance.

This period is of relevance where states have already ratified or acceded to

the treaty when the reservation is notified. With regard to states giving their final consent after the notification of the reservation, silence at the moment of giving final consent to the treaty will instantly be construed as tacit acceptance. If however the reservation has been notified less than 12 months before the confronted state has given its consent, that state will still profit from the period of 12 months. The time limit set out in the rule of tacit acceptance is a case of progressive development and not one of codification of customary law. The drafters of the Vienna Convention did consider proposals for varying lengths and finally chose the longest period.⁵⁹ The reservation clauses in certain treaties provide periods of different lengths. Article 20(5) of the Vienna Convention has only a residuary character and acknowledges that treaties themselves may stipulate shorter or longer periods than 12 months.

As a particular rule not belonging to general international law (international custom) it may be invoked only if a certain number of conditions are present. It will not be possible to invoke the rule before 27 January 1980, the date the Vienna Convention entered into force and only with respect to treaties "concluded" after that date.⁶⁰ It is equally binding only between states being parties to the Vienna Convention. Whether the practical impact of the rule of tacit acceptance will go beyond the formal limitations under the Vienna Convention remains to be seen.⁶¹

The rule on tacit acceptance with the specific time limit for making objections applies only to statements embracing true reservations. If a simple declaration is made, the rules on tacit acceptance and objection do not apply.⁶² Protests against undesirable declarations are not subject to the time limit under article 20(5), nor will they have the legal effects of objections proper.

A look at the treaty practice of states shows that disapprovals have sometimes come after quite remarkable delays. This observation is not based on any attempt to separate simple declarations from genuine reservations.

Looking at the instances where statements have been met with formal disapproval, we find that out of 721 disapprovals, 458 were expressed on ratification or accession, or at an even earlier date after signature but before final consent, whereas 263 were expressed after the disapproving state had already given its final consent to the treaty. Of these 263 disapprovals 141 have been presented before the expiry of 12 months from the date the *Secretary-General* had received the relevant statements and 118 disapprovals after the expiry of this period.⁶³

Now, these figures do not give a correct picture of whether reactions would have been 'on time' or 'too late'. The period of 12 months for reacting is to be counted from the date the *confronted states* have received notification of the statement and not from the date the Secretary-General received it. Any investigation of the matter is obstructed by the fact that the UN publication on the status of *Multilateral Treaties Deposited with the Secretary-General* contains only information about the dates the Secretariat has received the reservations and declarations and not about the dates the confronted states have been informed of them. Further it is not quite clear if it will suffice that the formal disapproval is dated before the expiry of 12 months or if the disapproval must reach the Secretary-General or the reserving state before the expiry of the period.

Taking into consideration that the transmission of information about reservations and declarations will take a certain time, we will look at reactions on the basis of an 18-month period counted from the day the Secretary-General received the reservation or the declaration until the day he received the formal reaction.⁶⁴ This would provide a period of 6 months for the communications between the Secretary-General and the disapproving state. We still find that 80 disapprovals have been 'late' compared with 183 being 'on time'. Thus it may be contended that about every third disapproval would have been late if the 12-month period had been applicable all along.⁶⁵ There does not appear to have occurred any shift in time as more states have ratified the Vienna Convention and after it finally entered into force in 1980.

That states may have had the 12-month rule in mind is demonstrated by the following example. The British government thought it advisable to explain its late reaction towards two reservations by invoking late receipt of the notification about them. The GDR had acceded on 27 December 1973 to three of the four 1958 Law of the Sea Conventions affixing statements to two accessions.⁶⁶ On 13 May 1975 the British government made formal objections to the GDR statement regarding article 20 of the Convention on the Territorial Sea and article 9 of the Convention on the High Seas, explaining its late action due to the fact that notification of the statements had not been received until August 1974.⁶⁷ The statement contained proper reservations which consequently could fall under the rule of tacit acceptance. In this very case we see that it may occasionally take even more than 6 months for communicating the text of a reservation to the interested states.⁶⁸

Quite a late reaction occurred when the FRG objected to the reservation by Trinidad and Tobago not accepting the limitations to the possible derogation from the obligations under the Covenant on Civil and Political Rights as set forth in article 4. Trinidad had formulated its reservation on 21 December 1978 and the objection by the FRG occurred on 21 April 1982.⁶⁹ The FRG had signed the Vienna Convention on 30 April 1970, but has not yet ratified it (1985). Nor is Trinidad and Tobago a party to the Vienna Convention. Article 20(5) of the Vienna Convention does not apply formally already on the ground that it will not have retroactive effects on treaties concluded before 27 January 1980.

The United Kingdom having ratified the 1973 Convention on Internationally Protected Persons on 2 May 1979 objected on 15 January 1982 to a reservation of Burundi dated 17 December 1980. Whether the UK objection could be considered as 'late' depends very much on how long it took for the UK to receive information of the Burundian reservation.⁷⁰

We find a very late United States objection of 24 April 1974 to the Egyptian reservation of 9 June 1964 to article 37(2) of the Diplomatic Relations Convention denying certain privileges and immunities to the administrative and technical personnel of diplomatic missions. The US objection thus came more than 10 years after the reservation had been received by the Secretary-General. The US government did ratify the Convention as late as 13 November 1972 and this would have been the moment for entering the objection if the Vienna Convention rules were to apply.⁷¹

A similar case of a very late reaction is provided by the FRG objection to the Soviet Union reservation to article 9 of the Convention on the High Seas

excluding any foreign jurisdiction over government-owned merchant ships on the high seas. The USSR reservation dates from 22 November 1960 and the FRG objection from 17 July 1974, although the FRG had ratified the convention on 26 July 1973. As in the case of the US objection, the objection by the FRG should have been made on the date of ratification one year earlier if the article 20(5) of the Vienna Convention was to be applied.⁷²

On 22 February 1983 the Secretary-General of the UN received the objection of Australia concerning the Kuwaiti reservation to article 27 of the Diplomatic Relations Convention guaranteeing the immunity of the diplomatic bag. Kuwait presented the reservation when acceding to the convention on 23 June 1969, that is after the Australian ratification on 26 June 1968. More than ten years had passed before the Australian government reacted. An explanation to this may be that more recently Saudi Arabia had acceded to the Convention with a similar reservation (10 February 1981). Australia was not willing to accept this reservation and becoming aware of similar reservations formulated earlier, decided to object to them all. Thus also the reservation by Bahrain received by the Secretary-General on 2 November 1971 and the reservation by Libya received on 7 June 1977 were objected to. Only Australia and Kuwait have by the end of 1985 ratified the Vienna Convention (13 June 1974 resp. 11 November 1975).⁷³

Only the future will show how efficient compliance with the objection rules of the Vienna Convention will be. There is nothing in more recent objection practice that would give a hint that confronted states have tried to be more rash with their objections and protests. It must be admitted that even more recent examples of 'late' reactions do not constitute any derogation from article 20(5) of the Vienna Convention as in none of the relevant cases has it been formally applicable. However, it will probably occur even in the future when article 20(5) becomes applicable, that late objections will occur from time to time. The Secretary-General of the UN in his role as depositary will probably receive objections even if they occur after the expiry of the 12-month period or the date of ratification or accession.⁷⁴

The formulation of article 20(5) of the Vienna Convention leaves some doubt as to the nature of the rule on tacit acceptance. Either the provision expresses a criterion for the validity of an objection or it establishes no more than a presumption of acceptance. Article 20(5) states "... a reservation is considered to have been accepted ..." where no objection has been made within the period of 12 months. The Commentary by the ILC to the Final Draft of the Law on Treaties speaks of a "presumption" of consent after a certain period of time and provides examples of treaties containing clauses on tacit acceptance of reservations.⁷⁵ The 1952 International Convention to Facilitate the Importation of Commercial Samples and Advertising Material and the 1929 International Convention for the Suppression of Counterfeiting Currency stipulate that "... a reservation shall be deemed to be accepted ..." where no objection is received within 90 days respectively 6 months. On the other hand the Commentary mentions treaties which limit the right to make objections to a certain period. Article 8(2) of the 1957 Convention on the Nationality of Married Women requires that a notification of objection "... must be made ... within ninety days ...".⁷⁶

The rules adopted in 1959 by the Inter-American Council of Jurists and often referred to in the preparatory work of the Vienna Convention consider that the absence of a reply from a confronted state during the so-called consultation period of 1 year has the effect that "... it shall be understood that that State has no objection to make to the reservations."⁷⁷ The Harvard Draft speaks of an assumption of tacit acceptance after a considerable time.⁷⁸ During the discussions at the 14th and 17th session of the ILC on the regime of reservations reference was made to the "presumption of acceptance".⁷⁹ There are various reasons to prefer the rule of tacit acceptance as a rule of presumption and not as an absolute rule on the validity of an objection. The former is a more flexible rule which allows for a greater freedom to consider various aspects of each individual case. The latter reading makes us apply a rigid rule which may lead to unreasonable results. Confronted states will probably even in the future communicate 'late' objections. A rigid rule on tacit acceptance would necessitate more detailed rules on the notification procedure indicating clearly when an objection has been made on time. This may be the case where the date of the communication of the objecting state, the date of receipt of this communication by the depositary or the date of the receipt of the notification from the depositary by the reserving state lies within the period of 12 months. The understanding of the rule of tacit acceptance as a rule of presumption will put the burden of proof on the confronted state. A confronted state which has not objected within the period of 12 months may still be able to prove that it had not been willing to accept the reservation. This could be done by showing that it had on other occasions promptly objected to identical reservations by other states or that on signing the treaty it had expressed its disagreement in general terms with any reservation of the instant kind. A treaty may always stipulate that objections not made within a certain period are to be considered as without effect.⁸⁰

22.10 INVOCATION OF INCOMPATIBILITY IN OBJECTION PRACTICE

Confronted states disapproving of a statement have made reference to its incompatibility. Such qualified disapproval has been formulated in different ways, referring either to the "aims", "letter and spirit", or "object and purpose" of the treaty. It is not quite clear if this variation in terminology has been deliberate or is merely accidental. The latter case seems more likely due to the fact that one and the same disapproving state may have used different expressions with respect to separate statements of identical content. Thus, for example, the FRG used three different expressions on reacting upon the identical reservations to article 11(1) of the Diplomatic Relations Convention when declaring them to be against "the letter and spirit", "the letter and intent" and the "purpose and objective" of the convention. A closer adjustment to the Vienna Convention terminology may be noticed in more recent years.

With respect to some of the statements made to the following 11 treaties the question of incompatibility was raised:

	affected provision	subject-matter	declaring state(s)*	disapproving state	designation used	effects as specified
1. 1947 CONVENTION ON SPECIALIZED AGENCIES	section 32	ICJ comp. jurisd.	P.R. of China	Netherlands 1980	"objectives and purpose"	"does not wish to raise formal obj."
2. 1961 DIPLO. RELATIONS CONV.	art. 11(1)	size of missions	Byelorussia Mongolia Ukraine USSR	Belgium 1968 FRG 1964	"letter and spirit" "letter and spirit"	— —
			Ukraine	FRG 1964	"letter and spirit"	—
			Mongolia	FRG 1967	"letter and spirit"	—
			Bulgaria	FRG 1968	"letter and spirit"	—
			GDR	FRG 1974	"letter and intent"	— —
			Dem. Yemen	FRG 1977	"purpose and objective"	—
	art. 27(3)	dipl. bag	Bahrain	Czech. 1972 FRG 1975 Hungary 1975 Mongolia 1978 Poland 1975 Libya 1977 Saudi Arabia 1977	"object and purpose" "object and purpose" "objectives" "very object and purpose" "object and purpose" — —	"cannot be considered admissible" — "does not recognize reservation as valid" "not bound" "not bound" "not valid" "invalid"
	art. 37(2)	adm. personnel	UAR/Egypt	Belgium 1968 <i>clarification</i> 1975	"letter and spirit" —	— "objects, but treaty remains in

*Declaring state is a state having entered a reservation or a declaration.

	affected provision	subject- matter	declaring state(s)*	disapproving state	designation used	effects as specified
						force except provision concerned"
				FRG 1967	"content and spirit"	—
			Morocco Portugal	FRG 1968	"letter and spirit"	—
			P.R. of China	FRG 1977	—	"not valid"
			Viet Nam	FRG 1980	"object and purpose"	—
			Sudan	FRG 1981	"object and purpose"	"does not prevent entry into force of the Conven- tion"
3. 1963 CONSULAR RELATIONS CONV.	art. 62	tax ex- emption	Morocco	FRG 1977	"purpose and objective"	"no obstacle to the entry into force of the Con- vention be- tween the FRG and Morocco
	art. 65	exemp- tion from registr.	Morocco	FRG 1977	"purpose and objective"	"no obstacle to the entry into force of the Con- vention be- tween the FRG and Morocco
4. 1973 INTERNAT. PROTECTED PERSONS CONV.	art. 2(2)	oblig. to make crimes punishable	Burundi	FRG 1981	"object and purpose"	—
				Israel 1982	"object and purpose"	"unable to consider Burundi as validly acceded until res. with- drawn"
				UK 1982	"object and purpose"	"unable to consider Burundi as validly acceded until res. with- drawn"
	art. 6(2)	assure presence	Burundi	FRG 1981	"object and purpose"	—

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	affected provision	subject-matter	declaring state(s)*	disapproving state	designation used	effects as specified
		of offender for purp. of prosecution or extradition		Israel 1982	“object and purpose”	“unable to consider Burundi as validly acceded until res. withdrawn”
				UK 1982	“object and purpose”	“unable to consider Burundi as validly acceded until res. withdrawn”
				Italy 1985	“aim and purpose”	“cannot consider . . . accession as valid as long as it does not withdraw that reservation”
5. 1948 GENOCIDE CONV.	art. IX	ICJ comp. jurisdiction	Bulgaria Byelorussia Czech. Philippines Poland Romania Ukraine USSR	Brazil 1952	“object and purpose”	“reserves the right to draw any such legal consequences as it may deem fit”
	+					
	art. XII	territ. application				
			Bulgaria Byelorussia Czech. Hungary Poland Romania Ukraine USSR	R. of China 1954	“object and purpose”	“would not regard the above-mentioned states as being parties to the Convention”
			Albania	R. of China 1955	“object and purpose”	“would not regard the above-mentioned state as being a party to the Convention”
	art. IX only		Albania Algeria	Netherlands 1966	“object and purpose”	“will not deem such a

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	affected provision	subject-matter	declaring state(s)*	disapproving state	designation used	effects as specified
			Bulgaria Byelorussia Czech. Hungary India Morocco Poland Romania Ukraine USSR			State a party to the Convention"
6. 1966 COVENANT ECONOMIC RIGHTS	art. 1	self-determination	India	FRG 1980	"object and purpose"	"interpretation not valid"
7. 1966 COVENANT CIVIL RIGHTS	art. 1	self-determination	India	FRG 1980	"object and purpose"	"interpretation not valid"
	art. 4(2)	right of derogation	Trinidad	FRG 1982	"object and purpose"	
				Netherlands 1982	"object and purpose"	"considers res. unacceptable and formally raises objection to it"
8. 1953 POLITICAL RIGHTS OF WOMEN	art. I + art. II + art. III	vote in elections, eligibility, right to hold publ. office	Spain	Czech. 1955	"objectives"	—
			Guatemala	Yugoslavia 1954	"not in accordance with principles in article 1 of the UN Charter"	—
9. 1979 DISCRIMINATION AGAINST WOMEN CONV.	art. 2	no commitments where against Sharia law	Bangladesh 1984	FRG 1985	"against object and purpose"	"not preclude entry into force"

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affected provision	subject-matter	declaring state(s)*	disapproving state	designation used	effects as specified
			Mexico 1985	" "	" " + "should be considered invalid"
		Egypt 1981	FRG 1985	as above	as above
art. 2(f)	leg. against discrimination	Cook Island (New Zealand) 1985	Mexico 1985	as above	as above
art. 5(a)	modify cult. pattern	Cook Island (New Zealand) 1985	Mexico 1985	as above	as above
art. 9(2)	nationality of children	Egypt 1981	FRG 1985	as above	as above
		Jamaica 1984	FRG 1985	as above	as above
			Mexico 1985	as above	as above
		Korea, Rep. of 1984	FRG 1985	as above	as above
			Mexico 1985	as above	as above
art. 11(1)(b)	right to same employment opportunities	Mauritius 1984	FRG 1985	as above	as above
			Mexico 1985	as above	as above
art. 13(a)	right to family benefits	Bangladesh 1984	FRG 1985	as above	as above
			Mexico 1985	as above	as above
art. 15(a)	choice of residence	Brazil 1984	FRG 1985	as above	as above
art. 16	marital status of women	Egypt 1981	FRG 1985	as above	as above

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	affected provision	subject- matter	declaring state(s)*	disapproving state	designation used	effects as specified
	art. 16(1)(a)	entry in- to marriage	Brazil 1984	FRG 1985	as above	as above
	art. 16(1)(c)	marriage responsi- bilities	Bangladesh 1984	FRG 1985	as above	as above
				Mexico 1985	as above	as above
			Brazil 1984	FRG 1985	as above	as above
			Korea, R of 1984	FRG 1985	as above	as above
				Mexico 1985	as above	as above
	art. 16(1)(d)	parents rights	Korea, R of 1984	FRG 1985	as above	as above
				Mexico 1985	as above	as above
	art. 16(1)(e)	family planning	Korea, R of 1984	Mexico 1985	as above	as above
	art. 16(1)(f)	guardian- ship of children	Bangladesh 1984	FRG 1985	as above	as above
				Mexico 1985	as above	as above
			Korea, R of 1984	FRG 1985	as above	as above
				Mexico 1985	as above	as above
	art. 16(1)(g)	family name	Brazil 1984	FRG 1985	as above	as above
			Korea, R of 1984	FRG 1985	as above	as above
				Mexico 1985	as above	as above
	art. 16(1)(h)	property	Brazil 1984	FRG 1985	as above	as above
10. 1958 TERRI- TORIAL SEA CONV.	art. 16(4)	passage through straits	Tunisia	Israel 1961	"object and purpose" general obj. to all in- compatible res.	-

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	affected provision	subject-matter	declaring state(s)*	disapproving state	designation used	effects as specified
11. 1958 HIGH SEAS CONV.				Madagascar 1962	“object and purpose” general obj. to all in- compatible res.	—
	art. 19/21	criminal immunity of warships	Czech. Hungary	Madagascar 1962	“object and purpose”	—
	art. 20/21	civil immunity of warships	Bulgaria Byelorussia Czech. Hungary Romania Ukraine USSR Colombia	Madagascar 1962	“object and purpose”	—
	art. 23	innocent passage of warships	Bulgaria Byelorussia Czech. Hungary Romania Ukraine USSR Colombia	Madagascar 1962	“object and purpose”	—
	general			Israel 1961	“objects to all res. incompatible with purpose”	—
				Madagascar 1962	“objection to all res. and statements inconsistent with aims and purposes”	—
	art. 1 (<i>inter alia</i>)	interpret. of terms ‘territorial sea’ and ‘internal waters’	Indonesia	FRG 1974	“inconsistent with aims and purposes”	“present decl. does not affect the applicability in all other respects, of this Conv.”
	art. 2 +	freedoms of the high seas	Iran	FRG 1974	“inconsistent with aims and purposes”	“present decl. does not affect the applicability in
	art. 3	free access				

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affected provision	subject matter	declaring state(s)*	disapproving state	designation used	effects as specified
+	of non-coastal state				all other respects, of this Conv."
art. 4	non-coastal state's right to sail under own flag				
art. 26(2) + art. 2	right to lay cables	Iran	FRG 1974	"	"
art. 15	definition of piracy	Albania Bulgaria Romania Poland USSR Byelorussia Ukraine Czech. Hungary GDR	FRG 1974	"inconsistent with aims and purposes in so far as the said declarations are to be qualified as res."	"present decl. does not affect the applicability in all other respects, of this Conv."
		Mongolia	FRG 1977	"	"
		Bulgaria Byelorussia Czech. Hungary Poland Romania Ukraine USSR	Madagascar 1962	"inconsistent with aims and purposes"	—
art. 9	immunity of gov. ships	Albania Bulgaria Mexico Poland Romania USSR Byelorussia Ukraine Czech. Hungary GDR	FRG 1974	"inconsistent with aims and purposes"	"present decl. does not affect the applicability, in all other respects, of this Conv."
		Mongolia	FRG 1977	"	"
		Bulgaria Byelorussia Czech. Hungary Poland Romania Ukraine USSR	Madagascar 1962	"inconsistent with aims and purposes"	—

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	affected provision	subject matter	declaring state(s)*	disapproving state	designation used	effects as specified
12. 1982 LAW OF THE SEA CONV.		general: does not set aside national legislation	Philip- pines 1984	Bulgaria 1985	"contra- venes prohib. under art. 310 + "at vari- ance with customary I.L. and with art. 18. of VC"	"devoid of legal force"
				Byelo- russia 1985	"contrary to art. 309" + "inconsis- tent with art. 310"	"having no legal force"
				Czechos- lovakia 1985	"incom- patible" + "inconsis- tent with art. 309" + "contra venes art. 310"	"cannot recog- nize . . . as ha- ving any legal effect"
				Ukraine 1985	"inconsis- tent with art. 309 and 310"	"cannot regard as having legal force"
				USSR 1985	"prohi- bited under art. 309" + "incompa- tible with art. 310"	"cannot recog- nize as lawful"
13. 1969 CONV. ON LAW OF TREATIES	art. 66 + annex	disputes settlement	Syria	USA 1971	"object and purpose"	"reject treaty rela- tions under all provi- sions in Part V"
	art. 66 only			Tunisia 1972	—	"will . . . declare that it will not consider that art. 53 or 64 . . . is in force between the US and Tunisia"

* Declaring state is a state having entered a reservation or a declaration.

This outline of the practice of invoking the criterion of incompatibility clearly shows how states have been uncertain when referring to the incompatibility rule. As to the use of terms and expressions it must be admitted that terminology has become more uniform, states nowadays designate completely rejectable reservations as incompatible with the object and purpose of the treaty in full accordance with the words used in the Vienna Convention.

There is a marked inconsistency as concerns the legal effects an "incompatible reservation" is to have. In legal doctrine the view has been expounded that where a reservation is established as incompatible two solutions may be conceived:

- (1) The instrument of final consent turns out to be invalid and the reserving state remains outside the treaty

or

- (2) the reservation is null and void but the instrument of consent is effective and the reserving state becomes a party to the entire treaty.⁸¹

The rationality of the reservation regime under the Vienna Convention which speaks in favour of conceiving compatibility to be an absolute requirement for a reservation to be admissible would support this view. Where a reservation fails the compatibility test the result is in theory that either only the reservation or also the instrument of ratification or accession are void. Because the incompatibility of a reservation will normally not be established on the basis of an authoritative decision by the competent organ of an international organization (the case of organizational treaties) or by an international tribunal (the case where compulsory jurisdiction has been recognized) the incompatibility of a reservation and the legal effect of an incompatible reservation has to be determined on a bilateral level. A state considering a reservation incompatible may only for its own part consider the instrument of consent containing the reservation as invalid and deny any treaty relations with the reserving state, or it may consider the reservation void and not opposable to itself assuming full treaty relations with the reserving state. The first solution seems more realistic. A reserving state can hardly be expected to admit that its reservation is void (not even on a bilateral level), especially when other states appear to have accepted the reservation.

In the majority of the cases presented above the state invoking the incompatibility of the reservation has not specified the effect its objection was to have. However, in those cases where the objecting state has tried to specify the effects of its objection or protest the inconsistency of these clarifications is striking. Anything from simply stating that the disapproval should have no effect whatsoever to categorically barring the reserving state from participation in the treaty seems to be possible:

(a) A case where the disapproving state did not wish its formal reaction to have the effects of a proper objection was when the Netherlands considered a reservation of the People's Republic of China 'excluding' the compulsory

jurisdiction of the ICJ under the Convention on the Privileges and Immunities of the Specialized Agencies to be incompatible with the objectives and purposes of the Convention.⁸²

(b) A disapproving state has also declared that in spite of the fact that the statement is incompatible it raises only a simple objection which according to the Vienna Convention rules only 'excludes' the affected provisions from being applied. Belgium clarified in such a way its objections to the Egyptian and Kampuchean reservations to article 37(2) of the Diplomatic Relations Convention. Such was also the case with respect to the FRG disapprovals of the statements by Indonesia, Iran, a number of socialist states and Mexico to various provisions of the High Seas Convention. The formal reactions by the FRG to the reservation by Sudan to article 37(2) of the Diplomatic Relations Convention and by Morocco to article 62 of the Consular Relations Convention must be considered to have in mind the same effect although they simply indicated that they would not constitute any obstacle for the entry into force of the said Conventions between the FRG and Sudan respectively Morocco.

(c) In connection with the Syrian statement to the Vienna Convention on the Law of Treaties the USA declared that one entire part (part V) of the Convention would not be operative with respect to Syria, thus going beyond the limited effect of a simple objection but falling short of the maximum effect. A number of general objections were to have the same effect.⁸³

(d) Objections have also been given maximum effect, as occurred when the Republic of China and the Netherlands objected to the reservations and declarations entered by some socialist states. More recently this has happened in connection with the objections by the FRG, Israel, Italy and the United Kingdom with regard to the two reservations by Burundi to the 1973 Convention on Internationally Protected Persons.⁸⁴

(e) By far the most disapprovals which specify their legal effects declare simply that the statement is to be considered "invalid", "inadmissible" or "not binding". A normal reading would suggest that the reservation or declaration is void. However, this cannot be considered the correct standpoint in every single case. Such disapprovals have to be closely scrutinized in order to find out their intended effects.

(f) A reacting state believing a statement to be incompatible may prefer to be prudent and not commit itself to any special effects. On disapproving of the statements by socialist states to articles IX and XII of the Convention on Genocide, Brazil informed that it "reserves the right to draw any such legal consequences as it may deem fit from its formal objection to the above-mentioned reservations".⁸⁵

This rich variety of legal effects that have been attached to formal reactions invoking incompatibility commends prudence with respect to similar disap-

provals which do not specify their legal effects. It will be difficult to evaluate the actual legal effects of such qualified disapprovals before the reacting state has clarified its position.

What one may demand is that reacting states pay more attention to a clear and consistent formulation of possible disapprovals. Any reference to incompatibility should be avoided in those cases where the reacting state actually wants to enter into treaty relations with the reserving state with the exception of the disputed provisions. A simple objection is sufficient for this purpose. If the confronted state really considers the reservation to endanger the effective operation of the treaty it may condemn the reservation as being incompatible. The effect of such a qualified objection would be to reject any relations under the treaty with the reserver, or possibly to exclude a major part of the treaty from applying. This would be the normal case. In those exceptional cases where the incompatibility of a reservation may be settled in an authoritative and objective way, the reservation could be declared null and void whereby the reserving state would remain a party to the entire treaty or it would have to renounce participation in the treaty if the reservation was an essential condition for participation. On certain occasions the objecting state declares void a reservation and urges application of the integral treaty. If the dispute about the admissibility and opposability of a reservation cannot be bindingly settled the only solution would be to debar all treaty relations.

A fact which further confounds the analysis regarding objections invoking incompatibility is that statements which clearly must be classed as interpretative declarations have also been declared incompatible. The Indian statements concerning the provisions on self-determination in the two Human Rights Covenants from 1966 were actually interpretative declarations and not proper reservations. Eleven socialist states declared that article 15 on the definition of piracy in the High Seas Convention was too narrow as it did not include "certain acts which under contemporary international law should be considered as acts of piracy".⁸⁶ This was only a general declaration of policy which at its best could have some value for advocating a wide interpretation of article 15 but not amounting to any modification of the rights and duties under the convention. Nevertheless, these declarations were said to be incompatible in the formal reactions by the FRG and Madagascar. Another example is the FRG protest to the Indonesian declaration to the High Seas Convention concerning the interpretation of the terms "territorial sea" and "internal waters".⁸⁷

It would be preferable to reserve the notion of incompatibility for reservations only. The dislike of certain unilateral interpretations could very well be expressed in other words. This naturally presupposes that reservations and interpretative declarations are separate and independent concepts, a question which is to be dealt with later.⁸⁸

It must be further noticed that the formal reactions by one and the same state to identical statements are not consistently qualifying them as incompatible. Reservations to article 27(3) of the Diplomatic Relations Convention on the diplomatic pouch were declared incompatible by the FRG on one occasion (Bahrain) but not on two other occasions (Libya and Saudi Arabia). The Egyptian reservation to article 37(2) on administrative and technical personnel under

the same Convention was considered incompatible but the same reservation by the People's Republic of China was not. Similarly the USA termed the Syrian reservation to the disputes settlement procedure under article 66 and the annex of the Vienna Convention as incompatible with the object and purpose of the Convention but not the Tunisian reservation to that article.

The views on the compatibility or incompatibility of certain kinds of reservations may change during the course of time. Reservations formerly considered to be condemnable may later become tolerated. The most familiar case is the category of reservations rejecting the compulsory disputes settlement clause, which form the largest group of reservations. However, as the objection to the Syrian reservation shows such reservations may still occasionally be regarded as incompatible.

CHAPTER 23

WITHDRAWAL OF RESERVATIONS AND OBJECTIONS

23.1 THE CONDITIONS FOR WITHDRAWAL

A reservation and an objection may be withdrawn at any time. Withdrawal constitutes a unilateral act as the Vienna Convention does not require the consent of the accepting states (art. 22(2)). However, the provisions of the Vienna Convention are of only a residuary character. The treaty itself may provide for other rules. Reservations clauses in treaties do in fact frequently regulate the withdrawal of reservations. Normally, they conform with the rules of the Vienna Convention.¹ Some of the European conventions call upon the parties to withdraw their reservations "as soon as circumstances permit".² It also happens that the parties submit the reservations to a joint procedure for an examination in order to determine which reservations could be withdrawn.³

When a reservation is partly withdrawn it may become acceptable to some objecting states. In the practice of the UN Secretary-General as depositary there are no such cases where a partial withdrawal of a reservation would have led to the withdrawal of an objection.

When a maximum effect objection is withdrawn it means that the treaty will enter into operation in accordance with the terms of the reservation. It is though possible to replace a qualified objection by a simple objection.⁴

A withdrawal is, according to article 23(4) of the Vienna Convention, to be formulated in writing. It does happen that a reservation or an objection for certain reasons becomes inoperative but that the reserving or objecting state forgets to communicate a formal withdrawal.⁵ Therefore the compilation of the UN Secretary-General on the status of treaties deposited with him and listing reservations, objections and withdrawals does not provide in all respects a correct picture of the actual legal state of affairs of the deposited treaties.

23.2 THE UNILATERAL CHARACTER OF WITHDRAWALS

The provisions of the Vienna Convention concerning reservations constitute to some extent a compromise between the proponents of the unanimity rule, based on the idea of integrity of the treaty, and the proponents of the flexibility rule, based on the idea of a treaty as primarily a consensual compact. Whereas the reservation regime of the Vienna Convention is primarily based on a consensualist view, considerations of integrity were admitted to play a role in the case of the rules on withdrawal of reservations. The states accepting a reservation, not to mention the objecting states, were assumed to approve of any measures which were to re-establish the integrity of the treaty. Curiously enough legal doctrine during the period when the unanimity rule was not dis-

puted was divided on this question. Thus Basdevant, Guggenheim, Podestà Costa, Rousseau and Accioly did accept unilateral withdrawal, whereas Cereti, Khadjenouri and Scheidtmann required the consent of the other parties.⁶ Other writers were less categorical about accepting unilateral withdrawal in those cases where the interests of the confronted states might be negatively affected in any way.⁷ Jenks accepting the possibility that the withdrawal of a reservation may extend the obligations of the confronted states, was not ready to abandon the requirement of consent in such cases.⁸ He did not give any examples of such reservations. Vitta made it plain that the possible reciprocal operation of the reservation was the decisive criterion for determining if consent was required for withdrawal.⁹

During the drafting of the Vienna Convention there was some support for the idea that withdrawals had to be accepted. According to the doctrine of *actes contraires* the abrogation of legal norms had to follow the same legal procedure as their creation.¹⁰ As a reservation intends to bring about an opposite or a modified norm its legal basis must be the same as that of the original treaty norm it is going to replace. As it became generally recognized that reservations would become legally binding only if accepted, the withdrawal would consequently also have to be approved.¹¹

It has also been argued that a confronted state may have been in favour of the reservation and that it may have been the reason for its participation in the treaty.¹² Therefore a unilateral withdrawal of a reservation could affect negatively the interests of the accepting state. Another argument against unilateral withdrawals was that an accepting state may have changed its internal legislation due to reservations presented by other states. It was therefore considered justified to require the approval of the accepting states before proceeding with the withdrawal.¹³ These were, however, isolated views, while the majority was in favour of unilateral withdrawals.¹⁴ It was deemed reasonable to assume that in general, contracting states would have nothing against seeing a reservation abandoned, thus paving the way for the integral operation of the treaty. The Vienna Convention does not establish the unilateral character of withdrawals as an absolute rule and a treaty may provide for a different procedure. None of the treaties deposited with the UN Secretary-General requires the acceptance of a withdrawal. Certain commodity agreements introduce a specific procedure for accepting reservations which may have a bearing on their withdrawal. The 1968 International Sugar Agreement states that the Sugar Council is to decide if and under which conditions a reservation is to be accepted. If the Council has decided that a reservation permitted on the condition that the obligations of the other parties are to be modified in a certain way, a return to the original norm system may create problems. In such a case it may not be advisable that reservations are withdrawn without inquiring into the views of the other parties. Naturally, the Council may decide on the procedure for withdrawal.¹⁵

23.3 THE ENTRY INTO OPERATION OF WITHDRAWALS

The date on which the withdrawal of a reservation becomes effective is the

moment the confronted state receives notice of it. The Vienna Convention makes it clear that the moment when the withdrawal becomes effective has to be determined independently for each confronted state.¹⁶ Notifications of withdrawal cannot be assumed to reach all parties at the same time.¹⁷ Waldock in his first report on the law of treaties (art. 17(6)) did not touch upon this question. The proposed provision said simply that the withdrawal was to be effected by a written notification to the depositary. This could have been understood to mean that the withdrawal was to become effective on the day the depositary had received the written notification of withdrawal. This is the formula we find in a number of the European conventions.¹⁸ A treaty may also stipulate that withdrawal is to become effective after a certain period from the receipt of the written withdrawal by the depositary, which is the case with some conventions of the Hague Conference on Private International Law.¹⁹ Such a rule makes it possible to determine the date when the withdrawal enters into force simultaneously for all parties. Proposals were made that also the Vienna Convention should state that withdrawals were to become operative after a certain lapse of time so to give the confronted states the chance to alter their national laws or adjust their administrative practice.²⁰ A period of three months was considered to be sufficient. The rapporteur changed the ILC draft in accordance with this wish, but the ILC finally decided to abandon such a period of grace.²¹ There was a general reluctance towards making the rules too complicated. The goal was to strive towards a general rule expressed in simple terms still permitting different rules to apply in special cases.²²

It has been rightly remarked that the Vienna Convention makes it possible for each confronted state to determine the moment from which the withdrawal enters into operation, but that it does not take notice of the position of the reserving state.²³ A confronted state having received the notification of withdrawal will probably not inform the depositary of its receipt of the withdrawal and consequently the depositary will not be able to transmit such information to the withdrawing state. The dangers of a withdrawing state not knowing when its withdrawal enters into force may be exaggerated and perhaps never arise in practice. A withdrawing state will presumably comply with the original obligations of the treaty once it has sent a notice of withdrawal to the depositary.²⁴

Withdrawals of objections have to be effected in the same manner as withdrawals of reservations. The date when a withdrawal of an objection enters into force is determined in the same way as in the case when a reservation is withdrawn, that is the moment the other state, i.e., the reserving state, receives notification of the withdrawal of the objection.²⁵ We have here the same difficulty which affects the withdrawal of reservations. The withdrawing state, in this case the objecting party, may be at pains to determine when its withdrawal has become effective and when it is still bound by a norm system modified by the reservation. As mentioned earlier an objecting state may in the end find it more profitable to accept a reservation. A state withdrawing its objection will now profit from the reservation on the basis of reciprocity from the date the reserving state has received notification of the withdrawal of the objection.

23.4 THE PRACTICE OF WITHDRAWING RESERVATIONS AND DECLARATIONS

States do not often withdraw reservations. This is evidently the case with reservations registered with the UN Secretary-General. Some of the actions which the Secretary-General has published as withdrawals are not proper ones, but simply the abandoning at the moment of final ratification of reservations that had been entered at signature. A reservation is not definitely formulated before it has been confirmed in the instrument of ratification.

Of those 1522 statements embracing reservations and/or declarations and being registered by the UN Secretary-General, 47 have been withdrawn completely or partly. In the majority of cases, i.e., 30 statements, the withdrawals have been partial. Of these, 6 have experienced successive withdrawals leading in only two cases to a complete withdrawal.²⁶ Of the 47 withdrawals, 11 have occurred in connection with succession to the treaty. Fiji retained only parts of the reservations and declarations of the UK to the 1951 Refugees Convention and the 1954 Convention on Stateless Persons.²⁷ Zambia did not maintain any of the British statements to the Convention on Statelessness but introduced instead five new reservations referring to four articles.²⁸

In the *Trial of Pakistani Prisoners of War* case in 1973, Pakistan claimed that the 1928 General Act for the Pacific Settlement of International Disputes was in force between India and Pakistan and thus formed the basis of the Courts jurisdiction. According to the 1947 Independence Act section 4, Pakistan as a successor state to British India succeeded to her rights and obligations under the multilateral treaties binding upon her before the partition. The Pakistani notification of succession was intended to be declarative of the fact that it had been a party to the Act since the date of its independence in 1947, and at the same time a "non-affirmation" of the various limitations that British India had affixed to her accession to the Act. India contended that neither India nor Pakistan had succeeded to the Act of 1928 and that it *a fortiori* was no longer in force.²⁹ However, even if the Act had been in force and India and Pakistan had succeeded to it, the limitations as formulated in the statement of British India could still be invoked by India³⁰ Pakistan would have had to admit that its withdrawal of the British Indian reservations would only be effective as from the date the depositary and India had received notice of it.³¹

23.5 THE PRACTICE OF WITHDRAWING OBJECTIONS AND PROTESTS

The instances of withdrawal of objections are even less frequent than those of withdrawal of reservations. The Secretary-General of the UN has registered only 5 cases where a formal disapproval has been withdrawn. In 1982 Cuba withdrew all statements of disapproval that the Batista regime had made against the reservation to article IX on the compulsory jurisdiction of the ICJ, and the declaration to article XII containing a territorial application

clause formulated by seven socialist states to the Genocide Convention. With the transition to a socialist regime under Castro, Cuba came to follow the reservation practice of the group of socialist states frequently presenting statements to disputes settlement and territorial application clauses. Cuba did not for a long time undertake any action with respect to the former disapprovals, although it had lately resorted to identical reservations and declarations. These formal disapprovals were thus considered as "forgotten objections".³² It was not until 1982 that Cuba remedied this inconsistency by formally withdrawing the objections and protests of 1953.³³

Greece withdrew its formal disapproval of the second part of the statement Turkey had made signing the 1951 Refugees Convention. This was actually not a reservation but simply a notification that Turkey on ratification would enter reservations it was authorized to under article 42 of the Convention.³⁴ The formal protest by Greece was withdrawn before Turkey on ratification indicated the statements it intended to present.³⁵

Fiji and Tonga did not maintain the British formal disapproval of the Indonesian statement relating to the delimitation of the territorial sea. Indonesia who had not become a party to the 1958 Convention on the Territorial Sea thought it nevertheless necessary to clarify how it "interpreted" the expressions "territorial sea" and "internal waters" as used in article 1 of the Convention on the High Seas. Indonesia had declared that the Convention had to be interpreted according to its national regulations of 1960 concerning Indonesian waters, and establishing the Indonesian territorial sea as a maritime belt of 12 nautical miles, the outer limit of which was to be fixed on the basis of baselines consisting of straight lines connecting the outermost islands or parts of such islands.³⁶ Though Indonesia formulated its statement as an interpretation of certain expressions in the High Seas Convention to be in accordance with its national regulations, the United Kingdom considered it advisable to express her disagreement with the statement.³⁷ In order to contravene a situation where it could be claimed that the UK had acquiesced in the interpretation, it declared the statement of Indonesia "not to be valid under international law" and therefore not opposable to the United Kingdom. Fiji and Tonga did not maintain this formal disapproval entered on their behalf by the British government and replaced it by more detailed statements of disapproval. Fiji and Tonga declared that if the Indonesian statement was to have the effect of enclosing as internal water parts of the high seas, the right of innocent passage shall continue to exist in those waters subject to the usual limitations that govern this right.³⁸

To sum up, there was only in the Cuban case a withdrawal of an objection as concerns the part of the statement regarding the compulsory settlement of disputes. The Greek formal reaction was only a protest as it related to a statement that clearly was no reservation. There is some uncertainty as to the Indonesian statement and consequently it is difficult to decide if the formal disapprovals are objections according to the Vienna Convention or simple protests. The case of the reactions to the Indonesian statement is further complicated by the fact that two of the reacting states had formerly been dependent territories to the UK. The actions by Fiji and Tonga may either be seen as withdrawals of formal disapprovals entered into on their behalf by a

metropolitan government and as replacements by new formal reactions with different content, or as abstentions from entering disapprovals identical to the one made by the UK and as the formulation of separate ones. In the instant case both Fiji and Tonga spoke of their reactions as being "withdrawals". They had thus recognized the competence of the United Kingdom to have acted on their part at the international level considering the whole matter to be a case of treaty succession.

PART TWO
INTERPRETATIVE DECLARATIONS

could have the character of reservations. An interpretative declaration does not intend to introduce a derogatory norm system, but intends to assert what is to be considered correctly as the "régime normal du traité."⁹

Private efforts to codify the law of treaties have equally vacillated between different conceptions. The Harvard Draft from 1935 seemed to have classified interpretative declarations as reservations.¹⁰ Only those interpretations which failed to fulfil the formal requirements of reservations would not qualify for reservations.¹¹ This means that they were either not in written form, or were not endorsed on the original treaty itself, not included in the instrument of ratification or accession, or not recorded in a separate formal instrument collateral to the treaty.¹² Once a declaration of interpretation fulfilling the formal requirements of a reservation expresses the intention of the declaring state to consent to the treaty on the condition that "it or part of it is given a specified interpretation" it amounts to a proper reservation. The American Law Institute (ALI) in its Tentative Draft of 1959 on the Restatement of the Foreign Relations Law of the United States was not explicit with regard to interpretative declarations. The 1959 definition considered a reservation to have the following characteristics:

"A reservation is a qualification by a party of its assent to an international agreement, made before the agreement becomes binding upon that party, and *intended to change its legal effect*" (emphasis added).¹³

In the definition of the subsequent Official Draft a slightly wider wording was chosen:

"A reservation is a formal declaration by a state made before an international agreement becomes binding upon it except upon terms that it regards as changing or *stating more precisely* the legal effect of the agreement" (emphasis added).¹⁴

Here the ALI appears to have switched towards comprising interpretative declarations in the concept of reservation. The Restatement as finally adopted in 1962 does not refer to interpretative declarations in its definition of 'reservation':

"A reservation is a formal declaration made by a signatory before it becomes bound by an international agreement, that the agreement will not be binding upon it except upon terms that it *regards as changing the effect* of the agreement under international law" (emphasis added).¹⁵

In its comment on this paragraph the ALI makes it clear that 'interpretative declarations' or 'understandings' are not covered by the definition.¹⁶

Hackworth having studied the practice of depositaries found that even they had reasoned differently. The Belgian government as depositary of the 1924 Convention for the Unification of Certain Rules Relating to Bills of Lading for the Carriage of Goods by Sea considered a statement by the United States not to be a reservation and therefore not in need of communication or registration.¹⁷ On the other hand, the British government as a depositary for the 1937 International Agreement Regarding the Regulation of Production

and Marketing of Sugar did not accept a "declaration of policy" by the United States for final deposit until the acceptance of the other signatory states had been established.¹⁸

24.2 THE DELIBERATIONS WITHIN THE INTERNATIONAL LAW COMMISSION AND THE VIENNA CONFERENCE ON THE LAW OF TREATIES

24.2.1 The deliberations within the ILC

The question of interpretative declarations was only sporadically touched upon in the preliminary deliberations on the law of treaties by the ILC. The definitions of reservation in Brierly's first report from 1950 and Lauterpacht's first report from 1953 made no reference whatsoever to interpretative declarations. Reservations were simply statements limiting or varying the effect of treaties.¹⁹ Fitzmaurice in his first report from 1956 and Waldock in his first report from 1962 made it explicit that interpretative declarations were not reservations and would therefore not be governed by the rules on reservations.²⁰ Fitzmaurice stated this in the commentary to his draft. Waldock even had a clear provision to that effect inserted in his draft articles. It was later moved to the commentary where it still remained in the Final Draft of the ILC from 1966.²¹

The question was for the first time discussed when François in 1950 asked for a clarification of Brierly's draft. He asked for an express reference to interpretative declarations to be inserted into the draft articles, which would have made it clear that these declarations were to be invariably identified with reservations.²² This was opposed by Yepes, Hudson and Spiropoulos.²³ At the 14th session of the ILC in 1962, where the first report of Waldock was discussed, Tsuruoka asked for a clearer indication of the difference between interpretative declarations and reservations. He was afraid of situations in which confronted states would refrain from making objections in reliance of the purely interpretative character of a statement and then would have to face a claim by the declaring state that the statement was in fact a reservation which had to be considered as accepted due to the inaction of the confronted state.²⁴

In the commentaries to the draft articles as adopted by the ILC at its 14th session and inserted in its report to the UN General Assembly, the Commission tried to make a distinction between reservations and interpretative declarations short of reservations:

"The need for this definition arises from the fact that States, when signing, ratifying, acceding to, accepting or approving a treaty, not infrequently make declarations as to their understanding of some matter or as to their interpretation of a particular provision. Such a declaration may be a *mere clarification of the State's position* or it may amount to a reservation, according as it does or does not vary or exclude the application of the terms of the treaty as adopted" (emphasis added).²⁵

Two of the governments commenting on the ILC draft of 1962 ventured into the problem of interpretative declarations. The Japanese government, in

accordance with the views propounded by Tsuruoka, asked for a clearer indication that interpretative declarations were not to be regarded as reservations.²⁶ The United Kingdom made the observation that a more thorough analysis of interpretative statements was missing, and wished it would be undertaken by the ILC at a later stage.²⁷ The special rapporteur responded to these observations by stating that interpretative declarations were not reservations and therefore not dealt with by the ILC at that stage for the simple reason that they "appear to concern the interpretation rather than the conclusion of treaties".²⁸ These declarations would fall under articles 67–71 of the draft concerning interpretation. They constituted the "context of the treaty" as an "instrument related to the treaty and . . . drawn up in connexion with its conclusion" (article 69(2)) which was to be taken into account for the purposes of its interpretation (article 69(3)). This view was seconded by El-Erian.²⁹

The 17th session of the ILC in 1965 entered into a more thorough discussion of the question of interpretative declarations. The only new arguments were provided by Verdross, who on various occasions came back to the question of interpretative declarations. Referring to the definition of reservation which mentioned the 'excluding' effect he contended that as a contracting state informed that it was willing to accept one of the articles of the treaty only if interpreted in a certain sense " . . . its declaration was therefore meant to exclude the legal effect of some provisions of the treaty".³⁰ However, perhaps doubting the tenability of his assertion that interpretative declarations fall under the concept of reservation due to their 'excluding' effect, he admitted later that it "was possible to discuss whether or not such a declaration was a reservation, but the problem it raised was analogous to that raised by reservations".³¹ He said that he would be "personally satisfied if the ILC would state in the commentary that disregarding the theoretical aspect the problem of interpretative declarations should be regarded analogous to that of reservations".³² Verdross thus followed two lines of reasoning. On the one hand, the concept of reservation comprised by its definition interpretative declarations. On the other hand, reservations and interpretative declarations formed two distinct concepts, but there were practical reasons to apply the same rules to both. Yasseen categorically denied that interpretative declarations could be assimilated with reservations. He could see a very clear distinction between these two concepts. When a state formulated a reservation it already recognized that the relevant provision had a certain bearing, but it wanted to restrict or extend its legal effects in so far as itself was concerned. An interpretative declaration indicated that a formulation in a treaty should be understood in a certain way and attached to that interpretation an objective and general value.³³ Only if there was an authoritative interpretation and the declaring state gave a subjective one which varied from the generally accepted interpretation was it in effect a reservation.³⁴ El-Erian shared the view that was expressed in the commentary to the 1962 draft.³⁵ The commentary admitted that some declarations did not vary the effect of certain treaty provisions and should therefore be governed by the rules on interpretation, and some again did modify the effect and were therefore to fall under the rules on reservations. He was thus repeating his view from earlier sessions.³⁶

Ago and Castrén were staggering along the same lines as Waldock. Ago encountered difficulties in classifying interpretative declarations. He assumed them to have a varying effect, which made them related to reservations. However he also had to admit that the provision to which the declaration referred was not prevented from entering into force (with respect to the state formulating the declaration) but with one particular meaning rather than another.³⁷ Castrén saw difficulty in classifying interpretative declarations because he believed that interpretations could vary laws and also treaties.³⁸

24.2.2 The discussions at the Vienna Conference

The commentary to the final draft articles of the ILC submitted to the Vienna Conference on the Law of Treaties did but express the views of Waldock and Castrén. The commentary spoke of "declarations as to the understanding of some matter or as to the interpretation of a particular provision". If such a declaration is not "a mere clarification of the State's position but varies or excludes the application of the terms of the treaty as adopted" it amounts to a reservation.³⁹

Hungary proposed an amendment to the draft article 1 containing the definition of 'reservation' whereby "interpreting" declarations together with "excluding" and "varying" statements would constitute reservations. The amendment by Hungary was supported by the representatives of such states as Syria, Italy, Lebanon, Switzerland, Bulgaria, Argentina, the USSR and Mongolia.⁴⁰ The representative of Austria, Nettel, had some criticism of the formulation of the Hungarian statement, but as he also proposed a reformulation of the amendment, it must be assumed that he was in principle in favour of the Hungarian proposal.⁴¹ The representatives of other states, such as Australia, the United Kingdom, Ireland, the United States and Sweden expressed their disagreement with the Hungarian initiative.⁴² They shared the view already expressed in the commentary to the ILC draft according to which each statement had to be analyzed as to its legal effect on the treaty provisions, which had to be "excluding, limiting, or otherwise varying". The US delegate, Bevans, was afraid that the amendment was not bringing clarity into the matter. A number of other statements, such as 'understandings' so frequently resorted to by the US Senate, had to be regulated. American legal doctrine considered statements designated as 'understandings' as not qualifying as reservations.⁴³ Waldock, formerly the special rapporteur of the ILC on the law of treaties now expert consultant to the Conference, tried to clarify the view of the ILC by giving examples of interpretative declarations. Some such declarations:

(a) "were of a general nature and represented an objective interpretation of what was understood to be the meaning of the treaty",

(b) had the "purpose . . . to clarify the meaning of doubtful clauses",

(c) had the "purpose . . . to clarify the meaning of clauses which were controversial for particular states",

(d) "... dealt with the application of a treaty in certain circumstances peculiar to a State."⁴⁴

As reservations should be understood to mean statements which purported to exclude or vary the legal effect of certain provisions in their application to that state, every statement would have to be thoroughly examined before it could be contended that it was in fact a reservation. Therefore, it was quite doubtful if declarations of interpretation could generally be held to constitute reservations. The Hungarian amendment was not maintained in the Drafting Committee to which the amendment had been referred.⁴⁵

24.3 THE VIEW OF RECENT INTERNATIONAL LEGAL DOCTRINE ON INTERPRETATIVE DECLARATIONS

The drafting history of the Vienna Convention shows that even if there had been some support for the view that statements regarding the interpretation of a treaty should be assimilated with reservations, the majority was not in favour of such a categorical attitude. The nature of a statement being either a true reservation or declaration short of reservation had to be determined only after a close scrutiny of the effect of such a statement. A statement must have an 'excluding' or a 'varying' effect on the provisions of a treaty. However, there was not much guidance as to how these effects could be established.

Some writers only repeat the arguments already presented in the ILC and at the Vienna Conference. Although Rousseau maintains a definition of reservation advocated in his earlier works, counting as reservations also statements through which a state wishes to:

"préciser le sens qu'il entend attacher aux dispositions de cet acte ou à certaines d'entre elles"

he discusses also the case of interpretative declarations and considers them not to fall under reservations where they do not

*"... restreindre la portée des obligations."*⁴⁶

We find a similar adoption of the reasoning of the ILC in the general treatise on international law by Verdross and Simma.⁴⁷ Imbert mentions that the term 'modify' in the definition of reservation was used to make it possible to cover not only the case of so-called extensive reservations, but also to embrace the so-called interpretative declarations.⁴⁸ This is done in order to point out the possibility that statements although termed 'interpretative' may amount to reservations. Imbert's dissatisfaction with the Vienna Convention definition depends on his opinion that not all modifications of "the legal effect of certain provisions" will qualify for a statement to be a reservation. It would hold true only in the case where the modification consists in the restriction of obligations.⁴⁹ Sinclair seems to be of the opinion that the definition of the Vienna Convention excludes interpretative declarations, stating the understanding of the government concerned as to how certain provisions of the treaty will be applied as well as political statements setting out the views of the government concerned on broad or particular issues.⁵⁰

Elias although subscribing to the view that the excluding and modifying effects are the defining characteristics of reservations, approves of the arguments propounded by the Hungarian delegate, Ustor, in the Committee of the Whole of the Vienna Conference. According to Ustor the assertion of the 'modifying' and 'excluding' character, or the clarifying character of a vaguely formulated statement, would hardly be made objectively but decided independently by each party. One party, presumably the declaring state, would consider the statement as rendering the "true meaning" of the treaty, whereas the other party would perhaps consider it to be a "distortion", i.e., a modification of that meaning. Elias propagates that interpretative declarations never should be assimilated with reservations because he assumes that states resort to interpretative declarations in order to avoid the complexities and implications of the reservation rules.⁵¹ O'Connell says that a party may "make its interpretation known in the form of a reservation, with the intention of limiting its consent to the extent of its own interpretation."⁵² Eventually, he considers it preferable not to treat such statements as true reservations to which other states must object in order not to be bound by them.⁵³ If interpretative statements are treated as simple declarations the confronted states are not obliged to object in order to ward off the binding force of such unilateral interpretations. Tomuschat takes up the argument originally presented by Verdross during the Vienna Conference, according to which interpretative declarations are construed as to have an 'excluding effect'. According to him an interpretative declaration will generally possess all the characteristics of a reservation.⁵⁴ He develops further this argument by stating that "the binding choice of a certain interpretation out of a number of possible interpretations and the express changing of the formulation . . . have the same legal effect and therefore cannot be treated differently".⁵⁵ He thus shares the former view of Verdross by asserting that the 'excluding character' of an interpretative declaration consists in excluding a number of possible interpretations by appointing one as the only correct one.

To sum up, legal doctrine has not succeeded in doing away with the uncertainty from which the notion of interpretative declarations suffered throughout all the deliberations of the ILC and the Vienna Conference. Some writers such as Sinclair, Elias and O'Connell contend for different reasons that interpretative declarations should not be identified with reservations. The concept of reservation and the concept of interpretative declaration were independent and non-overlapping. Others like Tomuschat demand that these declarations should be identified with reservations. The concept of interpretative declaration formed part of the broader concept of reservation. A third group chose a position between these two extremes by counting only interpretative declarations presented as an absolute condition for participation in the treaty as reservations.⁵⁶ The concept of interpretative declaration and the concept of reservation were distinct but partly overlapping.

CLARIFYING THE CONCEPT OF INTERPRETATIVE DECLARATION

25.1 THE TERM 'INTERPRETATIVE DECLARATION' AND THE CONCEPT OF INTERPRETATIVE DECLARATION

The discussions on interpretative declarations seem to have been plagued by a lack of conceptual clarity. It appears that writers mean different things when they talk about interpretative declarations. Some have meant the term 'interpretative declaration' as used on various occasions by states, other have had an objective concept of interpretative declaration in mind. In this respect the elucidation of the problem of interpretative declarations has encountered the same difficulties which haunted the early deliberations on the problem of reservations. Some writers, most convincingly represented by Genet, tried to analyze the question of reservations by taking a closer look at all statements that on some occasion had been designated by states as reservations, ending up in some kind of description of linguistic usage. Genet's definition had more the character of a lexical one.¹ Others again tried to construe a concept that to some degree was independent from actual linguistic usage. The latter alternative was clearly more fruitful in developing the rules on reservations. One of the accomplishments of the Vienna Convention is that it clearly marks the difference between the concept of reservation and the designation as reservation. The definition of reservation under the Vienna Convention is a stipulative one, and it stresses that the character of a statement as a reservation has to be determined independently from whatever designation has been given to the statement by the declaring state.

The discussions on interpretative declarations have not passed the initial stage of the elucidation of the problem of reservations. Speaking of interpretative declarations one interchangeably refers to both the expression 'interpretative declaration' as used by states and the phenomenon for which it is generally supposed to stand. Even here there is clearly a need to distinguish between concept and designation as was the case with the reservation problem. Otherwise we will continue to argue along the lines that declarations of interpretation are actually not interpretations but proper reservations or that reservations are actually not reservations but interpretations.

As concerns the outer requisites and their formal appearance, interpretative declarations may not be distinguished from reservations. Both are unilaterally initiated, cast in writing and presented at clearly identifiable moments. The distinction must be made on the substance of these two notions. The crucial question is whether the concepts of reservations and interpretative declarations are entirely separate or partly overlapping. The answer to this question will tell us if we are justified in saying that some or all interpretative declarations are true reservations and that they therefore are to be governed by the rules on reservations. If this is not the case we will have to admit that

statements may either be interpretative declarations *or* reservations but never both at the same time.

An interpretative declaration is an interpretation, which is distinguished from other interpretations by its form and by the moment it is presented. A reservation is a modification of the norm system expressed in a treaty. It is distinguished from other forms of modification because of its formal and temporal characteristics, as for example, formal amendments and supercession by new treaties regulating the same subject-matter. The answer to the question whether interpretative declarations and reservations form overlapping concepts or not, very much depends on our understanding of the concept of interpretation. What is the meaning of interpretation? Does it possibly have the effect of modifying the norm system of a treaty under certain conditions? Once the question as to the relation between the two concepts has been answered we can tell whether the rules on reservations shall or may apply to interpretative declarations and under which conditions this should happen. If we believe that the two concepts do not overlap we are not justified in asserting that the rules on reservations automatically apply to interpretative declarations. It is a separate question to decide, once the independence of the two concepts has been established, if there are weighty reasons to advocate the application of the reservation rules to interpretative declarations by means of analogy. We find the thought of two concepts under identical regulation, for example, represented in Owen's writings.² Here the unanimity rule and the rule of authentic interpretation were arguments in favour of identical regulation. Although Verdross was in the ILC primarily advocating assimilation of interpretative declarations with reservations, he believed there to be further practical reasons speaking for an analogous application of reservation rules to interpretative declarations in the case where his theoretical argument would fail.

25.2 THE PROBLEM OF ASSIMILATING THE CONCEPT OF INTERPRETATIVE DECLARATION WITH THE CONCEPT OF RESERVATION

25.2.1 The question of the 'excluding effect' of interpretative declarations (objective criterion)

This argument originally introduced by Verdross and later taken up by Tomuschat, builds on the assertion that an interpretative declaration has an 'excluding effect' as it asserts only one interpretation as the correct one, to the exclusion of all others. The question is, does such an 'excluding effect' of interpretative declarations fall under the expression "exclusion of the legal effect of certain provisions of the treaty" as used in the Vienna Convention?

As contended earlier, the legal effect of certain provisions must be comprehended as the criterion of a norm which imposes obligations and confers rights. Now the 'excluding effect' of a reservation is to be read as "negating the force of a norm", a duty for example is turned into a liberty. An interpretative declaration *qua* interpretation has no such effect. Such a

declaration has the function to assert the existence and contents of a norm where the text of the treaty leaves us in doubt. It is not intended to have a derogatory effect, which is the case with reservations.

So reservations and declarations form completely distinct categories of acts due to their different functions. A reservation affects the norm – an interpretative declaration operates on the norm formulation; their objects are distinct.³

For the present case it must be considered irrelevant that even interpretative declarations may indirectly affect the legal effect of provisions. Different interpretations may lead to the establishing of different norms which will regulate the subject-matter in different ways. However, all statements and all concrete actions may in the long run have certain consequences for the contents of norms.⁴

It seems a strange contention that by excluding certain possible interpretations the legal effects of certain provisions 'are excluded'. Interpretation is a prior act, which is necessary to ascertain the legal effect of certain provisions, the legal norms as expressed in these provisions. Only after the act of interpreting has been accomplished and the legal effect of a provision established, may an action be undertaken to derogate from the norm. It is not possible to establish and simultaneously alter a norm. Every act of deriving a norm from a legal text may be considered an act of interpretation. This is the case both when a text is deemed to be a clear expression of a norm and when the text remains obscure, and the various tools that the interpretation techniques furnish will be used to construe the norm.⁵

25.2.2 The question of the conditionality of interpretative declarations (subjective criterion)

This is an argument that has been more widely supported than the first one. It assumes that interpretative declarations may essentially be of two different kinds. The distinguishing criterion would be found in the intention of the declaring state. An interpretative declaration may be a 'weak one'. It is only explanatory or declaratory as its purpose is solely to inform the other parties how the declaring state understands certain formulations of a more or less imprecise kind and how it is going to apply the provision concerned. A state may also formulate an interpretative declaration out of an unyielding conviction that it is and should be the only valid one and that its understanding of the provision is an absolute condition for participating in the treaty. Such a declaration would be more constitutive than declaratory as the declaring state desires to constitute it as the only correct interpretation by refusing to accept any other interpretation.⁶ The idea of introducing the conditional character of interpretative declarations as the decisive distinguishing criterion was already propounded by v. Crayen in 1938 and later by Kappeler (1958), Gubin (1959) and Kozhevnikov (1964).⁷ More recently the same view has been expressed by Tomuschat.⁸ McRae, embracing the arguments of the 1977 Continental Shelf arbitration case between France and the United Kingdom, is equally ready to accept the criterion of conditionality.⁹ He distinguishes between 'mere interpretative declarations' which simply inform how the declarant state

interprets a treaty provision and a 'qualified interpretative declaration' whereby the declarant state makes the acceptance of the treaty conditional upon the acquiescence in its interpretation.

The idea to introduce the criterion of conditionality is an interesting one, however, it opens the door to a new set of problems. The criterion of conditionality is not the magic spell that makes it possible to decide if an interpretative declaration is a reservation proper. The character of a declaration as an absolute condition for participation in a treaty does not automatically turn it into an 'excluding' or a 'modifying' device. The 'excluding' or 'modifying' effect can only be asserted at the very moment one of the many possible interpretations is finally authoritatively established as the only right and valid one. This is the case once the parties have agreed upon an *authentic interpretation* through diplomatic negotiations; or have concluded a supplementary agreement on interpretation; or when a dispute concerning the interpretation of the treaty has been settled through judicial settlement or arbitration in a manner binding on all parties, which seldom occurs.¹⁰

Before any authoritative interpretation is achieved a situation of uncertainty will prevail and we are not able to tell whether the declaration has a modifying effect or not. At the moment the correct understanding of a provision is authoritatively settled, we may have to admit that the interpretative declaration loses its legal pertinence and turns into a simple description of the actual legal state of affairs.¹¹ However, if some other interpretation is judged to be the correct one, and the declaration turns out to be a derogation from the norm system as established it would fulfil the requirements for being considered a reservation. It seems correct to contend that only from the moment when the declaration is confirmed as representing a true derogation will the rules on reservations apply. This will depend on whether the declaring state is still willing to maintain its divergent interpretation. The declaring state will presumably in many cases submit to the authoritative interpretation and abandon its own declaration.¹² Tomuschat's argumentation for the decisive criterion of conditionality may be considered faulty because it is inconsistent. He characterizes a reservation as the "manifestation of an individual intention directed against *the definitely established consensus*" (emphasis added).¹³ A definitely established consensus is not present before the impreciseness of a norm formulation is finally redressed by an authoritative interpretation.

Where one would contend, like Tomuschat, that the rules on reservations were to operate as from the moment the confronted states receive notification of a 'qualified interpretative declaration' certain problems would arise. If a confronted state chooses to object, and some may do so purely for reasons of prudence, the affected provision would, according to the Vienna Convention, not apply.¹⁴ How then are the relations between the declaring and the disapproving state affected by the fact that the interpretation is later authoritatively confirmed? Does the formal disapproval in its turn become a reservation? Is there a presumption that the disapproving state is still maintaining its disapproval? Is the provision whose correct interpretation has been the cause of the dispute still to be considered as not operating between declaring and the disapproving state?

The situation where confronted states do not express their disapproval,

which is most common, will equally create some problems. The confronted states may not have any explicit reasons to oppose the statement, but neither may they be clearly in favour of the motives behind the interpretative declaration. If the reservation regime were to be applied to interpretative declarations the rule on tacit acceptance would also apply. Where the declaration is through a later binding judicial decision held to represent a valid interpretation no problems will arise. The parties are bound by the interpretation correctly expressed by the declaration. If the interpretation in the declaration is rebuked the situation instantly becomes problematic. A judicial decision going against the interpretative declaration may make the formerly disinterested state experience a sudden interest in the matter and wish to act with respect to the declaration.¹⁵ Where an interpretative declaration is definitely and bindingly declared to go against the correct reading, the confronted states will suddenly have a motive for expressing their disapproval. The proponents of the view that interpretative declarations formulated in absolute terms are to be governed by the rules on reservations, judge that the rule on tacit acceptance ought to apply from the date the declaration has been notified. It may be doubted whether this is a reasonable position. Do the confronted states have to react even though they have no clear apprehension of the true nature of the statement and thus no certainty as to the effect a formal disapproval will have in the future? Would not it be more just for the period of 12 months for construing tacit acceptance to run from the date of the authoritative judicial decision when the declaration has been established as not being the valid interpretation (or from the date the confronted states have received knowledge of this decision)? It may be further questioned if we are justified in presupposing that the declaring state maintains its derogatory interpretation or if we are to require the declaring state to reiterate formally its statement now it constitutes without doubt a reservation.

One is bound to ask what are the reasons for demanding that 'qualified interpretative declarations' should be governed by the same rules as reservations. The only reason that may be discovered, is that the rule on tacit acceptance brings certainty into treaty relations. This benefit is certainly exaggerated. Where doubts exist as to the correct interpretation and no authoritative solution is at hand, there is a general uncertainty as to the actual scope of the relevant norms. The relief in knowing the actual state of the legal relations between declaring and non-reacting states is marginal. The relations between declaring and disapproving states nevertheless remain obscure.¹⁶

A related though separate question is, if the rule on tacit acceptance may have a spill-over effect on the ordinary rules on interpretation. What effects does the passivity of the confronted states have in a future dispute over the correct interpretation of the relevant provision? Can the declaring state contend that because there has been no manifested opposition within the period of 12 months, the confronted states have acquiesced in the interpretation of the declaration being the valid one? Thus the interpretation expressed by the declaration would not only be operative as between declaring and non-disapproving states but objectively valid and binding on all relations under the treaty, even those between the confronted states. This would

be going rather far and probably considered a radical encroachment on the rules of interpretation. Inaction by the confronted states may have a certain significance for ascertaining the correct understanding of a provision, but its limited value has always to be kept in sight.

There are also practical problems which ensue from the criterion of conditionality. Interpretative declarations are usually dressed in neutral language and it will be well nigh impossible for the other interested states to decide if the declaring state considers its interpretation to be an absolute condition for entering into the treaty.¹⁷ The Brazilian government declared on signing the 1982 Law of the Sea Convention that it "... understands that the regime which is applied in practice in maritime areas adjacent to the coast of Brazil is compatible with the provisions of the Convention."¹⁸ In this declaration merely declaratory of the view of Brazil or will it be an absolute condition for its future participation in the Convention, even if it was decided that the regime was incompatible with the terms of the Convention? The wording of the statement provides no guidance in the matter. There is only a vague feeling that the statement is only declaratory and that Brazil will not push its view to the extreme. The French government declared with regard to article 2(4) of the Continental Shelf Convention, "that it considers that the expression 'living organisms belonging to the sedentary species' *must* be interpreted as excluding crustaceans, with the exception of the species of crab termed 'barnacle' " (emphasis added).¹⁹ The chosen formulation would suggest the interpretation to be an absolute condition for France's participation in the Convention. However, reservations are prohibited to that provision according to article 12 of the Convention and the government of France was naturally aware of this when formulating the declaration. If we were to construe it as a prohibited reservation it would be considered null and void and at worst even invalidating the French ratification if not withdrawn. A reasonable solution is to consider the declaration, in spite of its absolute and categorical formulation, as a simple declaration of France's views as to the correct understanding of article 2.²⁰

On signing Protocol No. I of the Treaty of Tlatelolco France declared in quite clear terms that

"Le Gouvernement français n'accepte pas que les obligations résultant du protocole no 1, qui renvoie aux articles premier et 13 du Traité, s'appliquent au transit, par des territoires de la République Française situés dans la zone du Traité et à destination d'autres territoires de la République Française, de dispositifs définis à l'article 5 du Traité."

It would appear that the unequivocal formulation would turn the declaration into a reservation. Now reservations are prohibited by article 27 of the Treaty of Tlatelolco. The solution most favourable to France would be to consider the declaration to be interpretative. This would be so in spite of the fact that the French government may have designated it as a reservation. It was speaking about "réserves" and "déclarations interprétatives" without specifying which of the 5 parts of the French statement were to count as reservations and which as interpretative declarations. The French view as to

the transit of carriers with nuclear weapons through the zone has some support in the preparatory work of the treaty. It would thus be difficult to consider it a clear derogation from the treaty obligations and therefore it would be more accurate to speak about it as an interpretative declaration.

Making the subjective criterion of conditionality the decisive one, and thereby overriding the objective criterion of norm alteration, will have certain absurd effects. There are interpretative declarations which are only affirmative because they present an understanding of a provision which evidently all parties agree to. Does such a declaration only because of its formulation in absolute terms turn into a reservation? Such a view is not likely to be accepted.

The concept of 'qualified interpretative declaration' as introduced by McRae could be saved by conferring on it a double character. Primarily such a statement has the function to inform the other parties how the declaring state wishes to interpret a treaty provision. However, it intends to be more than a plain interpretation and affirms that in the case some other interpretation is authoritatively established as the correct one, that interpretation will not bind the declarant. The statement contains both a normal interpretative declaration and a *potential reservation*.²¹ On the date another interpretation is established as the correct one the statement acquires the character of a reservation and the reservation rules become applicable. Objections may be made within the period of 12 months from the date the correct interpretation has been ascertained. Disapprovals of 'qualified interpretative declarations' are before this date only *potential objections*. The Netherlands statement to the Covenant on Civil and Political Rights contains 'qualified interpretative declarations' being potential reservations. The Netherlands was in doubt whether to present interpretative declarations or formal reservations, but settled for the second alternative in order to ensure that the Covenant would apply only in accordance with its statement, even in the case where some of the interpretations prove to be wrong.²²

The construction of 'qualified interpretative declarations' as potential reservations would prevent some unreasonable effects considering the following case: On ratifying the 1953 Convention on the Political Rights of Women, Denmark formulated a formal reservation to article III prohibiting discrimination with respect to public offices. The prohibition was according to the reservation not to apply to military appointments.²³ Sweden thought it unnecessary to formulate a reservation as it considered it clear that the covenant did not cover military appointments.²⁴ If however the ICJ would find that the Swedish view was wrong, Sweden should have entered a reservation just like Denmark. In the case the reservation rules apply without distinction from the moment a state gives its final consent to the treaty, Sweden would have lost the chance to formulate a reservation after the Court had ascertained the scope of the treaty obligations. If the reservation rules were allowed to operate only from the moment the content of the relevant norm and the character of related statements have been established, Sweden would still have the chance to safeguard its position by formulating a reservation.

25.3 REASONS FOR APPLYING THE RULES ON RESERVATION TO THE DISTINCT PHENOMENON OF INTERPRETATIVE DECLARATIONS

One way to make the rules on reservations apply to interpretative declarations was to make interpretative declarations fall under the concept of reservation. Another method is to accept the independence of the two concepts, but argue for identical rules to be applied to them. According to one argument the analogous application of reservation rules to interpretative declarations brings certainty and predictability into treaty relations.²⁵ However, this may happen at too high a price. A unilaterally advanced interpretation which is disapproved of would make the relevant provision inoperative between the interpreting state and the opposing state. This was certainly never envisaged by them and would also be completely contrary to the principles of interpretation.

A further argument for letting interpretative declarations be governed by the same legal regime as reservations would be based on a reasoning *a fortiori* (*a maiori ad minus*). Reservations clearly deviate from the text of a treaty provision having the effect of altering a norm. Interpretative declarations do not affect the treaty provisions as profoundly. They only present an understanding of the text of a treaty in order to find the applicable norm. If the far-reaching rule on tacit acceptance would be approved with regard to reservations which change norms, it should be possible to apply it to unilateral interpretations which are only making a choice between two or more reasonable understandings. It would seem easier for states to acquiesce in the exclusion of certain possible interpretations than to the alteration of certain clearly ascertainable norms. This begs for the following comment: Reservations do not necessarily affect major rights and obligations; in the majority of cases they do not. Nor is it true that the prevalence of one interpretation over another is of minor interest for the confronted states. Divergent views on the correct interpretation have often been at the origin of a major conflict. Treaty provisions of crucial importance, and to which reservations are expressly prohibited, may become the object of interpretative declarations. This is proved by the various statements that were made to the Continental Shelf Convention.²⁶

There is another reason for rejecting the analogous application of the reservation regime to interpretative declarations out of expediency. The rule on tacit acceptance is an exemption to the general assumption that states enter into obligations on the condition of explicit consent. The situation where the decisions on measures and regulations of certain international organizations which become binding on the member states that have not, before the expiry of a certain period, explicitly declared that they are unable to accept the decisions as binding, is exceptional. The institution of *contracting out* exists in such international organizations as for example the WHO (Constitution, articles 21 and 22), the ICAO (Convention on International Civil Aviation, articles 37 and 38) and the Baltic Fisheries Commission (Convention on Fishing and Conservation of the Living Resources in the Baltic Sea and the Belts, articles 10 and 11).²⁷ The rule on tacit acceptance obliging confronted

states to react in order to avoid the bindingness of a reservation resembles very much the device of contracting out. They have the common characteristics that they have an exclusive and particular application. They will not be relevant in cases where they are not clearly stipulated.

Interpretative declarations must be treated as unilaterally advanced interpretations and should therefore be governed only by the principles of interpretation. The general rule is that a unilateral interpretation cannot be opposed to any other party in the treaty.²⁸ Inaction on behalf of the confronted states does not result in an automatic construction of acceptance. It will only be one of many cumulative factors which together may evidence acquiescence. The institution of estoppel may become relevant, though this requires more explicit proof of the readiness of the confronted states to accept the interpretation.²⁹

A single formally notified interpretation does not provide as solid a basis for the operation of acquiescence as does a more steadfast action such as the passing of a statute. Take for example the Norwegian Royal Decree of 1935 with regard to the drawing of straight baselines for determining the outer limits of the territorial sea. Norway had consistently and uninterruptedly applied the practice of drawing straight baselines for some 60 years.³⁰ The ICJ considered it justified to construe acquiescence on the part of the United Kingdom, because being a major maritime power bordering the North Sea she must have had special interest in the case and thus a special reason to make her opposition known. The *Fisheries* case shows that many requirements have to be fulfilled before acquiescence will be present.

The conclusion is that much more is needed for the construction of acquiescence to a unilateral interpretation than for the construction of tacit acceptance of a reservation. In the former case the interpretation may become opposable only after a meticulous weighing and accumulating of facts that may evince a favourable attitude to the interpretation.

Although there are still some writers who do adhere to the view that interpretative declarations are governed by the same rules as reservations, the majority of writers stress the importance of making a distinction between these two categories of statements.³¹ In recent legal cases concerning reservation problems the distinction has repeatedly been recognized.³² The recurrent problem is to find the criteria which will help to determine the nature of statements in individual situations.

25.4 THE PRESUMPTION FOR RESERVATIONS IN UNCERTAIN CASES

The dominating view during the drafting and the adoption of the Vienna Convention was that it is possible on objective grounds to determine if a statement changes the legal effect of provisions or only clarifies their meaning. As mentioned above, the Hungarian representative to the Vienna Convention, Ustor, held that the test of the modifying effect of a statement could not be objective but only subjective.³³ One party could consider a statement as rendering the true meaning of a treaty provision whereas another would

believe it to distort that meaning. This uncertainty was sufficient reason for Ustor to demand that the rules on reservations should extend to interpretative declarations.³⁴

The truth must lie somewhere between the one extreme that it will always be possible to ascertain if a statement is an alteration or only a clarification, and the other extreme that there may always arise doubts as to the actual bearing of a statement. There are certainly cases where a state may be able to determine on fairly reliable grounds that a statement introduces a derogation from a norm. And there are cases where a statement unequivocally does away only with the vagueness or ambiguity of formulations used in the treaty text. A statement that simply expresses a treaty provision in different but synonymous terms will not cause any doubts, nor will a statement that 'excludes' an entire provision, containing a duty, from applying.

However, statements often range somewhere in the middleground, where it will be hard to determine if it means a derogation from a treaty norm or only an affirmation. In such situations one will have to find a solution as to the actual character of the statement before it can be decided which rules are going to be applied.

The incertitude regarding the character of a statement may be 'subjective'. A contracting state may be in doubt as to the actual bearing of the statement. This incertitude is general when reserving and confronted states alike are not sure about the nature of the statement. Here it is unlikely that any party will claim the application of the reservation regime. The incertitude may be limited. The declaring state is convinced that its statement means an alteration or only a simple affirmation of a treaty norm, whereas the confronted state(s) remain in doubt as to the actual effects of the statement.³⁵ It is equally possible that only the declaring state has doubts as to the effects of its statement.

The incertitude may be 'objective'. Neither declaring state nor confronted states are in doubt but have definitive though divergent views on the character of the statement. It will be difficult to evaluate the situation where the declaring state believes its statement to be a clarification and the confronted states are convinced that it results in a modification.³⁶ The presumption that a statement is a reservation when a certain amount of uncertainty exists has some far-reaching consequences. It goes against the very consensual nature of treaty. The requirement of 'consensus' or concordance of wills does not only refer to the norms as such, but must also be present in respect of the basic assumptions on which the norms rest.³⁷ In other words there has to be not only agreement as to the legal consequences that will flow from certain existing facts, but also on those circumstantial facts. This brings us back to the question of the validity of the ultimate norms. The internal validity in its psychological sense has to be proved.³⁸ In order to apply any rules to a statement, there must be an agreement on the nature of this statement. If it is authoritatively established that the statement signifies a derogation, the rules on reservations will apply. If it is proved that the statement only affirms the correct reading of a norm formulation, the rules on interpretation will apply. If it is uncertain whether a statement does or does not alter the relevant norm it cannot be inferred that the rules on reservations nevertheless will be implemented.³⁹

The motive behind the assertion that doubtful statements must be presumed to constitute reservations was to avoid a state of uncertainty as to the scope of legal relations between the declaring state and the confronted states. This argument is not convincing.⁴⁰ If the relevant treaty provision is obscure the basic uncertainty as to the treaty norm persists in spite of the applied reservation rules. The relations between declarant and the confronted states may be clarified. With respect to the accepting states it will be applied according to the interpretation of the declarant. The legal relations between the confronted states *inter se* would according to the reservation rules not be affected and continue to remain obscure. Where the statement again is obscure, its acceptance or non-acceptance would according to the reservation regime not bring any certainty into treaty relations, in fact it may be increased. How is one to determine the relations between a declaring state and a state having 'tacitly accepted' the obscure statement? Are the legal effects of the relevant provision really 'excluded' or 'modified' as between the declaring state and the approving state?

Any regulation through treaty norms has to coexist with the problem of uncertainty. Every general legal regulation has to tolerate the difficulties which exist in applying broad and abstract norm formulations to individual cases. Applying norm formulations to concrete problems often means a laborious effort to cope with vagueness and ambiguity.⁴¹

25.5 DISTINGUISHING BETWEEN INTERPRETATIVE DECLARATIONS AND RESERVATIONS AS A PROBLEM OF INTERPRETATION

Theoretically it would seem unproblematic to draw a clear line of distinction between the concept of interpretative declaration and the concept of reservation by simply stating that the declaration helps us to infer from the presence of a treaty text the existence of a specific norm (individual norm), whereas the reservation brings about a derogation from an established norm. An interpretative declaration relates to the norm formulation, a reservation to the norm. The crucial task is to show that a norm is sufficiently circumscribed to determine when a statement has the effect of changing this norm. In order to prove a derogation from a norm we have to start by telling what the norm is about.

25.5.1 Conclusive and approximative interpretation

Any attempt to decide if a statement is an interpretation or a true reservation must start with an analysis of the formulation of the affected provision as well as the formulation of the statement itself. Ascertaining the force and content of a treaty norm and the bearing of a statement has to be pursued according to the generally accepted rules of interpretation. Our ideas on how a treaty text is to be understood and what are the norms that are formulated in the treaty provisions are but private speculations, which may be more or less persuasive. An interpretation of a text becomes, in the end, au-

thoritative if it has been carried out through certain formal procedures. Naturally, states being parties to the treaty are competent to establish the correct meaning of the text. Where an interpretation is authentic, i.e., it is based on a common agreement between the parties to the treaty, it will be authoritative and binding. Submission of the question of interpreting a treaty text to judicial settlement or arbitration is another mode of arriving at an authoritative interpretation. An authoritative interpretation is assumed to be conclusive. The correct reading of an imprecise norm formulation is definitely settled.⁴² Any other interpretation can henceforth be branded as being actually derogatory. Where interpretations are undertaken by the organs of a single state or by publicists, they may be more or less well-founded, but they will not have the same authoritative nature as authentic or adjudicated interpretations. They are not opposable and therefore not internationally valid, but they may be adequate approximations of what finally may be established as the only right and, thus, valid interpretation. As long as no authoritative interpretation is established, the whole question of the scope of the norms remains in a state of pendency. Every party will apply a treaty provision according to the specific interpretation it gives to the text and each of these interpretations may be put into operation on a limited scale and become effective within the jurisdiction of the applying state. It may however at any moment be questioned by another party.

Individual non-authoritative understandings of treaties may in some situations be more reliable than in other. The rules on interpretation provides a common code of arguments which the appliers of treaty texts will recognize as being relevant for legal reasoning. Assuming furthermore a common understanding and use of certain technical terms and expressions, a shared international legal language, each interpretation will have a chance to become a valid and binding one. It will be possible to give some apperception of which interpretations are fairly tenable and which are more or less unreasonable. There certainly are cases where individually presented interpretations express fairly well what everyone else would accept to be a correct description of a norm.

Doubts as to the force of a norm will be less frequent. Treaty provisions are usually clear in their intentions to introduce a duty or only a recommendation. Where a statement intends to deny a duty asserting instead a legal liberty, it will hardly be doubted that an alteration of the original norm will be the outcome. Many of the provisions to the Hague Conventions on the laws of war had only a recommendatory and not an obligatory force. That all the statements of signing and ratifying states underlining the non-obliging force of these provisions are only instances of clarifying and affirming interpretations is clear. The difficulties arise mostly where statements affect the propositional content of the norms.

25.5.2 The scope of interpretation

The action of interpreting may be divided into different kinds of interpretation depending on how far from the ordinary reading of the relevant text the final result lies. A distinction is made between 'clarifying interpretation'

(*interpretatio secundum legem*), 'amplifying interpretation' (*interpretatio praeter legem*), 'correcting interpretation' (*interpretatio contra legem*).⁴³ It is also contended that an acknowledgement that a text is unambiguous and clear is an act of interpretation. Such an interpretation may be termed 'affirmative' (*interpretatio intra legem*).

25.5.2.1 Affirmative interpretation

A state may for example stress the lucidity of a treaty provision by reformulating the provision or some of its expressions by synonymous terms. Where a statement is affirmative there is as a rule no doubt among the other parties that the clarification or specification is correct.

Argentina presented a statement to article 3 common to all four Geneva Conventions of 1949 on the humanitarian law of war according to which:

"... Article 3 ... shall be the only Article to the exclusion of all others, which shall be applicable in the case of armed conflicts not of an international character."

The statement is only restating what is actually said in articles 3 of the Geneva Conventions.⁴⁴ According to paragraphs 1 of the articles a state party is only bound by the following obligations:

"In the case of an armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum the following provisions;

(1) Persons taking active part in hostilities including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons;

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - (b) taking hostages;
 - (c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
 - (d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
- (2) The wounded and sick shall be collected and cared for."

The obligations during conflicts not of an international character are fully listed under paragraph 1 of articles 3. Paragraphs 3 of articles 3 implicate that the enumeration is comprehensive when they recommend that the other obligations under the Conventions should be assumed by means of special agreements.⁴⁵

25.5.2.2 Clarifying interpretation

Clarifying interpretation is present where the text of the treaty leaves some doubt as to which things, persons, acts, events and situations that should be covered by the regulation (operative facts) or as to the legal consequences that should be attached to these facts. Clarifying interpretation remedies the impreciseness of a text, be it words, expressions or whole sentences, in those cases where the ordinary reading provides for two or more possible solutions. Impreciseness of a formulation may be of two kinds; vagueness and ambiguity.

(a) Vagueness

All words and expressions are more or less vague due to inconsistencies in their use. Vague words do have an indeterminate field of reference. There is a core of phenomena to which people generally agree that the words should be applied, and there is a penumbra of cases where people have more or less varying opinions on whether the word should be used or not.⁴⁶ Vagueness may be considered the result of there being no agreement on the definite set of characteristics the object of designation must have in order to justify the use of the word or expression.

To take one example, we may conceive of four phenomena I, II, III and IV having different combinations of the characteristics a, b, c, d, e and f. Three persons have different views as to which of the phenomena are designated by the word X.

Person A considers that X designates phenomena:

$$I = (a + b + c)$$

$$II = (a + b + c + d)$$

$$III = (a + b + c + e)$$

Person B considers that X should cover phenomena:

$$II = (a + b + c + d)$$

$$III = (a + b + c + e)$$

$$IV = (a + b + c + f)$$

Person C uses X only to designate phenomena II and IV.

It thus appears that only phenomenon II constitutes the *core* of the meaning of the word X.

In order to illuminate the notion of vague expressions an example may be taken from treaty practice. We will once again turn to the French statement relating to article 2 of the 1958 Continental Shelf Convention concerning the understanding of the expression "natural resources of the continental shelf". The first Law of the Sea Conference was confronted with the problem of drawing a distinguishing line between those living resources that would fall under the traditional freedom of fishing and the new right of exploitation of the living resources of the continental shelf. The close attachment to the sea bottom was to become the distinguishing criterion, which was clarified in the following way in the Continental Shelf Convention:

"The natural resources referred to in these articles consist of the mineral and

non-living resources of the seabed and subsoil together with living organisms belonging to the sedentary species, that is to say, organisms which at the *harvestable stage*, either are *immobile* on or under the seabed or are *unable to move except in constant physical contact* with the seabed or subsoil." (emphasis added)

The first Geneva Conference on the Law of the Sea had to consider the nature of different living organisms associated with the continental shelf area. Such living organisms are, just to take a few species: 1. *Tubularia larynx* – sponge, 2. *Sagartia troglodytes* – coral, 3. *Lepas anatifera* – barnacle (cirriped crustacean), 4. *Eupagurus bernardus* – hermit-crab (decapod crustacean), 5. *Pandalus borealis* – shrimp (decapod crustacean), 6. *Ostrea edulis* – oyster (bivalves-mollusc), 7. *Octopus vulgaris* – octopus (cephalopod-mollusc), 8. *Asterias muelleri* – starfish (echinoderm), 9. *Pleuronectes platessa* – plaice (pisces) and 10. *Culpea harengus* – herring (pisces).⁴⁷

	a = living organism	b = which at harvestable stage:	c = sedentary		d = pelagic	
			c ¹ = immovable	c ² = moving in constant contact with bottom	d ¹ = mostly in contact with bottom	d ² = only exceptionally in contact with bottom
1. <i>Tubularia</i> -sponge	x	x	x			
2. <i>Sagartia</i> -coral	x	x	x			
3. Barnacle	x	x	x			
4. Hermit-crab	x	x		x		
5. Shrimp	x	x				x
6. Oyster	x	x	x			
7. Octopus	x	x			x	
8. Starfish	x	x		x		
9. Plaice	x	x			x	
10. Herring	x	x				x

There had been a general agreement that species having the characteristics a, b and c¹ would belong to the natural resources of the continental shelf and that species combining the characteristics a, b and d² would belong to the living resources of the sea which were subject to the freedom of fishing. These species constituted the core of the two concepts. Species having characteristics a, b and c² or a, b and d¹ belonged to the penumbra of both concepts. The Continental Shelf Convention tried to dissolve this penumbra by drawing a line of distinction between species which are in *constant* physical contact and those which are not. It is evident that the species combining characteristics a, b and c¹ and a, b, and c² do belong to the natural resources of the continental shelf, that is sponges, corals, barnacles, starfish and oysters, whereas species having the characteristics a, b and d¹ and a, b and d² such as shrimps, octopi, plaice, being a kind of fish living mostly on the bottom of the sea ('bottom fish'), and, naturally, herrings do not belong to these resources, but to the living resources of the sea. At first glance there seems to be no penumbra but a clear dividing line between these organisms in constant physical contact with the bottom which fall within the concept, and organisms not in constant physical contact with the bottom which fall outside

the concept. However, in spite of the clarifying definition in article 2(4) of the Convention the *definiens* still remains imprecise due to the vagueness that characterizes the term "constant". Does "constant" mean that the requirement of physical attachment is absolute? May it not occur that on some rare occasions an hermit-crab or a starfish may move for a very short time without contact with the seabed, when, for example, dropping or gliding from a jutting rock to the bottom beneath? The term 'constant' could be clarified as covering accidental disruption of the physical contact with the bottom. What is the case with lobsters which live under stones on the bottom of the sea or among seaweed? Lobsters are able to swim without physical contact with the bottom and this way of moving cannot be considered to be exceptional for the species of lobsters. There are, therefore, good reasons to believe that they are not included among the natural resources of the continental shelf. Owing to the fact that the expression "constant physical contact" remains vague we have still a conceptual penumbra to which many crustaceans may be referred, though not barnacles or shrimps. Organisms in uninterrupted physical contact with the bottom belong to the core of this delimited new concept. Organisms being occasionally in contact with the bottom fall definitely outside the scope of the term and do not even belong to its penumbra. To the penumbra of the new concept may be counted those organisms which regularly live on the bottom but are able to swim, and those which as a rule move in physical contact with the seabed but which occasionally may detach themselves from the bottom although their natural state is to live in physical contact with the seabed.

On accession to the Continental Shelf Convention on 14 June 1965 France declared:

"In depositing the instrument of accession, the Government of the French Republic declares:

Article 2 (paragraph 4)

The Government of the French Republic considers that the expression 'living organisms belonging to the sedentary species' must be interpreted as excluding crustaceans, with the exception of the species of crab termed 'barnacle'; ..."⁴⁸

With regard to the reference to barnacles the French statement would amount to an affirmative interpretation. They are a stalked species of crustacean and cling persistently to the bottom of the sea. The rest of the statement requires a closer analysis. Lobsters have the characteristic d¹ and would therefore not belong to the concept of natural resource of the continental shelf. In this respect the statement is interpretative. The case of the hermit-crabs turns out to be more problematic. These crabs live in abandoned snailshells and crawl over the bottom of the sea. The natural state for hermit-crabs is to live in physical contact with the seabed, although they may occasionally move detached from the bottom. Are they, nevertheless, to be considered to fulfil the requirement of "constant physical contact"? The French government did not think so, but thought them to have characteristic d¹. The French statement must be considered to move in the penumbra of the

two concepts of sedentary and pelagic organisms and is therefore to be classified as a clarifying interpretation.

(b) Ambiguity

A word or expression is ambiguous when it is used to express two or more different phenomena. The same word may be used to designate two separate phenomena without us always being able to tell if they have something in common which may justify the use of identical words.⁴⁹ The word 'state' is such an ambiguously used term which may either mean a condition or position in life, a body politic, to allege or aver something. The term 'prescription' means a prescribing, an order, a doctor's written direction for the preparation and use of a medicine, and the acquirement of a title under law through continued use or possession from time immemorial. Ambiguous terms may have some common characteristics which we may detect when looking at the etymological history of the words ('prescription'), but mostly we will remain unaware of them ('state'). As a rule we conceive ambiguous terms as having no characteristic in common. We are dealing with independent concepts.

In most cases ambiguity will not provide any problems. From the linguistic context we will know which of the possible meanings is intended. However, there are more subtle cases of ambiguity, where there is something in common to the phenomena we designate by the term. Where we encounter process-product ambiguity there may arise some real problems as to which of the two meanings is intended. For example the term 'international custom' is an example of the latter kind of ambiguity. It is both used to indicate the process through which norms of international law of a certain kind are created and the norms themselves that are the result of such a process.⁵⁰ Another example is the one already mentioned in connection with the retroactive application of the Vienna Convention.⁵¹ Here the process-product ambiguity of the term 'conclusion' was of interest. Does the non-retroactivity of the Vienna Convention relate to treaties which have been definitely concluded (product) before the Convention entered into force. Or does it affect treaties which are on the way to be concluded (process) at that moment? Other international legal terms which fall under process-product ambiguity are for example 'interpretation' and 'amendment'.

The word 'and' has occasionally created difficulties in interpreting international legal instruments. It is used both conjunctively and disjunctively.⁵² The drafting history of the rules on reservations in the Vienna Convention provides an illuminating example of the ambiguity of the term 'and'. The notion of 'plurilateral' or 'restricted multilateral treaties' was in the beginning given a wide scope listing the characteristics of such treaties with the disjunctive conjunction 'or'. This class of treaties was not to be governed by the new flexible rules on reservations but by the traditional rule of unanimity. "The nature of the treaty", "the fewness of its parties" plus "the circumstances of its conclusion" were independent criteria for determining if a treaty is intended to admit reservations only on the acceptance of all the parties and this was clarified by using the disjunctive conjunction 'or' in the definition of 'plurilateral treaties'.⁵³ The parallel provision in the final text reads: "When it

appears from the limited number of the negotiating states *and* the object and purpose of the treaty” that the treaty ought to be applied in its entirety between all the parties, a reservation may only be accepted unanimously (emphasis added). The disjunctive conjunction ‘or’ was replaced at the 17th session of the ILC in 1965 by the conjunction ‘and’, there being still three qualifying characteristics. In the final text they are limited to two. The replacing of the term ‘or’ by an ‘and’ is a reason to believe that ‘and’ had been used in its conjunctive meaning.⁵⁴ The majority of the ILC was in favour of a narrow concept of ‘restricted multilateral treaty’, which was affected by combining the characteristics through a conjunction.⁵⁵

Another case where the term ‘and’ created some problems of interpretation was not related to the application of an ambiguous treaty provision but concerned the formulation of a reservation. Article 85 of the 1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War stated that:

“Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention.”

The Democratic Republic of Viet Nam did on acceding 1973 to the four Geneva Conventions on the humanitarian law of war present the following reservation:

“La République Démocratique du Viet-nam déclare que les prisonniers de guerre poursuivis *et* condamnés pour des crimes de guerre ou pour des crimes contre l’humanité, conformément aux principes posés par la Cour de Justice de Nuremberg, ne bénéficieront pas des dispositions de la présente Convention ainsi que l’a spécifié l’article 85.” (emphasis added)⁵⁶

This reservation differs from a number of reservations formulated by socialist states to the same article which spoke only of prisoners “convicted” for these crimes.⁵⁷ Now a dispute arose between the Democratic Republic of Viet Nam and the United States as to the treatment of American servicemen most of them belonging to the US airforce. North Viet Nam did not consider these American servicemen as prisoners of war to which the benefits of the III Geneva Convention should extend. The North Vietnamese government pointed out that these persons were accused of violating the laws and customs of war by indiscriminately attacking the civilian population of the Democratic Republic of Viet Nam. No sentence had yet been pronounced, but North Viet Nam contended that it in accordance with its reservation could deny the benefits of the Convention from the moment legal proceedings had been entered against the servicemen. The government of North Viet Nam thus attached a disjunctive meaning to the word ‘and’ in its argument. The relevant reservation would thus introduce a wider derogation from the obligations under the Convention than the reservations by other socialist states.

In support of North Viet Nam’s contention it must be said that there is presumed to be a reason behind the choice of a wording that diverges from the formulations to be found in all the prior reservations by other socialist states. Further a conjunctive understanding would seem superfluous as the act of

sentencing presupposes prosecution. The same argument however, may be turned against North Viet Nam's view as the understanding would make the expression "and sentenced" superfluous if simple prosecution frees the detaining power from the obligations under the III Geneva Convention.⁵⁸ A reasonable understanding of the reservation must be favouring the conjunctive reading of 'and'. Only the final sentencing may prove the crime of the prisoner. The result will be absurd if a prisoner who is actually acquitted, nevertheless, loses the protection of the Geneva Convention on the simple ground that he had been prosecuted for the crimes enumerated.⁵⁹

Although the above-mentioned case speaks in favour of a cumulative meaning, there are decisions or awards of international tribunals which have given the word 'and' an alternative meaning. This was the case in the decision of 25 May 1925 by the PCIJ in the case concerning *Certain German Interests in Upper Silesia*, where article 23 of the German-Polish Agreement of 15 May 1922 had to be interpreted. The question was which meaning should be given to the expression "dispute relating to the interpretation *and* application of the Convention".⁶⁰ A similar case of a recent date is the Arbitral Award of 17 July 1965 where the Air Transport Agreement of 6 February 1948 between Italy and the United States had to be interpreted. The dispute concerned the understanding of section III of the Annex to the agreement speaking of "international traffic in passengers, cargo *and* mail" (emphasis added).⁶¹

A look at treaty practice that has been undertaken does not provide an example of a statement that would have borne upon the ambiguity of the term 'and' although it is well feasible that this happened on some occasion.

Ambiguity may not only be semantic, where a single word or an expression has more than one meaning, but it may also be syntactic, where the ambiguity depends on word order. The ambiguity may be done away with by changing the order of words.

In the *Anglo-Iranian Oil Company* case the ICJ had to settle the question of syntactical ambiguity in the Iranian declaration accepting the compulsory jurisdiction of the Court. The jurisdiction of the Court had been accepted:

"... sur tous les differends qui s'élèveraient après la ratification de la présente déclaration, au sujet des situations ou des faits ayant indirectement trait à l'application des traités ou conventions acceptés par la Perse *et postérieurs à la ratification de cette déclaration*, ..." (emphasis added)

Iran contended that the jurisdiction of the Court is limited to the application of treaties accepted by Iran after the declaration. It held that the expression "et postérieurs à la ratification de cette déclaration" refers to the expression "traités et conventions acceptés par la Perse". The UK argued that the expression "et postérieurs à la ratification de cette déclaration" refers to the expression "au sujet de situations ou de faits". The declaration would therefore relate to the treaties accepted by Iran at any time. The Court held that the "natural and reasonable way of reading the text" supported the Iranian view.⁶²

25.5.2.3 *Amplifying interpretation*

The amplifying interpretation goes beyond the ordinary reading of the treaty text. It is an intellectual act by which the meaning of the words or expressions is extended to phenomena which are not covered by the formulations used. The need for amplifying interpretation is caused by our relative ignorance of fact.⁶³ The deficiency of knowledge of the legislator or the framer of a treaty may concern the world as it is at the moment of final adoption of the treaty text, or the world as it may be in the future. An example of the first kind of ignorance relating to the world as it is, may be illustrated by the unilateral interpretation of the United States relating to the Constitution of the World Health Organization. The framers of the WHO Constitution were certainly able to realize the possibility that a member state would wish to withdraw from the organization, but they had not inserted a provision to that effect into the charter. It is an ignorance which borders on indifference.⁶⁴ The question of withdrawal from the organization was not regulated under the Constitution. When article 3 of the WHO Constitution says that "Membership shall be open to all States" it regulates only the question of becoming a member of the organization. The right to withdraw could be construed as being inherent in the right to enter into the organization. The United States Congress gave its consent to the acceptance of the Constitution subject to the statement that the US "reserves its right" to withdraw from the organization on one year's notice, provided however that the financial obligations of the United States to the organizations shall be met in full for the organization's current fiscal year.⁶⁵ The US Congress assumed this statement to be merely interpretative calling it an "understanding".⁶⁶ The World Health Assembly adopted unanimously on 2 July 1948 a resolution by which it recognized the validity of the ratification of the United States and its interpretation as correct. According to article 75 of the WHO Constitution, the Health Assembly has the competence to interpret in a binding way the Constitution.

A treaty may according to the normal reading of its formulations not cover situations which the drafters were unable to foresee when negotiating the treaty. An example that may possibly fall under this category of amplifying interpretation is the French declaration made to article 1 of the Continental Shelf Convention relating to the concept of continental shelf. This concept being originally solely a geophysical concept was specified by introducing the 200-metre isobath in combination with the criterion of exploitability. The 200m rule was favouring states like Argentina which have a vast shallow seabed off their coast, but unjust to states like Chile where there is no marked continental shelf in the geophysical meaning because there is an abrupt fall to the ocean bed. The criterion of exploitability had the effect of compensating for the unreasonable effects of the isobath criterion. The introduction of the exploitability criterion brought relativity and flexibility to the question of delimitation. Of course back in 1958 there was no reason to believe that all parts of the ocean floor would be explorable and exploitable within the foreseeable future. Exploration and exploitation was at that time feasible to the depth of only 550 metres.⁶⁷ The concept appeared at that moment sufficiently well delimited. However, within a relatively short time it became clear that states would soon have the technical facilities to explore and exploit

all parts of the ocean floor. It was quite natural for the question to arise how this new situation was to be settled. Was the criterion of exploitability permitting an 'unlimited' extension of the continental shelf across the ocean floor?⁶⁸ The idea of proximity and the idea of exploitability had thus turned out to be irreconcilatory. The text of the provision did therefore not manage to provide an answer to this question.⁶⁹ The French government wanted to make its view clear that the definition was not to be interpreted as allowing for an 'unlimited' extension of the continental shelf.⁷⁰ France wished to stress that the criterion of adjacency was the principal one, whereas the criterion of exploitability was a secondary one only elucidating the main criterion. The correct view is that the 200m isobath is subject to the exploitability criterion and this again subject to the adjacency criterion.⁷¹

The notion of *open texture* of concepts is a special case of our relative ignorance of fact or the limitations of our knowledge. It is mainly connected with empirical terms.⁷² If a phenomenon which has been designated by a special term suddenly reacts in a completely surprising way we will have to reconsider the use of the term. Waismann mentions the case of a cat that suddenly grows to a gigantic size, or under certain conditions can be revived from death.⁷³ Are we to suggest that all the living beings hitherto called cats have this special property and that we will have to modify our concept of cats by adding a new characteristic though keeping the old term or are we to believe in the existence of a special category of cats creating a new subconcept and a new term. Concepts are open textured if there is a possibility of vagueness.⁷⁴ A term may well be open although it is not vague because sufficient conditions for the use of the term are present. The reason is that one of the unspoken presumptions is missing. If, for example, we suddenly observe that from the leaves of some of the plants of the *Erythroxylon Coca Lamarck* may be extracted some other substance with less harmful properties than cocaine or *methyl-benzoyl laevo-ecgonine* the question arises if we have found a new species belonging to the family of *Erythroxylaceae*. How does this new discovery affect the application of all the conventions on drugs? Are these treaties going to apply or not to apply to these plants producing a less harmful substance than the traditional cocaine. Will it be necessary to amend the definitions in the relevant treaties? A statement which would bear on the open texture of a concept cannot be construed as a modification but at most as an instance of interpretation or application.⁷⁵

The impreciseness of a norm formulation which creates doubt as to the regulation of a certain subject-matter may not only be the result of ignorance but also deliberate. The negotiating states may not have come to an agreement whether a certain question should fall under a prohibition or not. The formulation of the legal instrument has been deliberately kept imprecise in order not to commit the parties to any of the opposite solutions. Quite often such a step is taken with the silent wish that the question will find a solution through subsequent state practice, or that the parties will agree on the matter by a supplementary agreement. Where a state in such a case consents to the treaty and informs that it will understand the deliberately imprecise formulation according to one of the conflicting views, it simply manifests its support for that alternative and notifies that it still adheres to its view as earlier

expounded. If this will turn out to be the valid one only the future will tell. It will not be appropriate to construe it as a reservation that may become tacitly accepted.⁷⁶ The invalidity of a treaty due to the threat or use of force according to article 52 of the Vienna Convention covers at least armed force. Some states wanted to have it clearly spelled out that even economical and political coercion would be included under the rule of coercion causing the invalidity of treaties. The Vienna Conference was unable to extend invalidity under article 52 to such forms of coercion because views were divided. As the formulation of article 52 now stands reference is made only to coercion in violation of the principles of the UN Charter. The framers of the Vienna Convention thus managed to put off the problem for the time being. Syria was the only state that ratified the Convention with the statement that the expression "the threat or use of force" used in article 52 "extends also to the employment of economic, military and psychological coercion and to all types of coercion constraining a State to conclude a treaty against its wishes and its interests".⁷⁷ Syria's statement relates to a situation where the negotiating parties have not been able to arrive at a common solution. The subject-matter is not regulated on this point and the Syrian statement must be seen as a declaration of interpretation or policy on how it wishes the question to be settled. Only Japan, Sweden, the United Kingdom and the United States expressed their disapproval of the Syrian statement on this matter. The formal reactions by these states show that they have referred to the statement as being interpretative in kind.⁷⁸ Construing the statement as a reservation would have the result of turning the silence by the other parties into a tacit acceptance which would be unreasonable considering that a number of the inactive parties had voted against the amendment clarifying article 52 to comprise other forms of force than armed coercion.⁷⁹

The term 'amplifying' is normally used to tell that the regulation through interpretation is extended to apply to acts, events, situations, etc., not foreseen or not foreseeable, irrespective of whether the actual case is ascertained to fall under the right or obligation, or if it is stated not to be covered by the right or obligation. An amplifying interpretation may be said to operate in a negative way when the new instance is considered not to be the object of the right or the obligation, and in a positive way when it is declared to be the object of this right or obligation.

25.5.2.4 *Correcting interpretation*

This is an interpretation that clearly goes against a formulation as it is generally understood. A correcting interpretation contradicts the text as the conclusion it comes to is clearly contrary to its usual meaning. This interpretation is only resorted to most cautiously, especially in international law where textual interpretation has a predominance over the other methods of interpretations. A correcting interpretation may be justified in those cases where the normal reading of the text would lead to absurd situations or evidently unjust results that are contradicting the principle of *bona fides*, the fundamental principle on which all interpretation is based. Evident errors in the formulation may be remedied by such an interpretation, if not the formal

procedures are initiated on the common agreement of the parties to correct the error.⁸⁰ It is important to be aware of the fact that a correcting interpretation is contrary to the text but does not alter a norm. Any interpretation, be it affirmative, clarifying, amplifying or correcting, helps to establish a norm.

25.6 THE PURPOSE OF INTERPRETATION

Interpretation may cope with problems of various kinds. Ross for instance mentions interpretation which solves *semantical problems*, problems that arise in connection with asserting the correct meaning of words and expressions in norm-formulating sentences.⁸¹ The interpretation has either to find out the conventional use of words or to detect the specific meaning where the expression is assumed to belong to a technical language having a meaning distinct from the usual one. The rules in the Vienna Convention on interpretation constitute a presumption for the ordinary use of words and expressions. It must be underlined that not only everyday language but also the international legal vocabulary belongs to "ordinary language". In the realm of international legal interaction we face a language that is traditionally and universally used in the dealings between states, such as, for example, 'accession', 'entry into force', 'mission', 'internal waters', 'practice'. Semantical problems are usually centred around problems of vagueness and ambiguity as treated above.

Interpretation tries also to settle *syntactical problems*. Uncertainty may be caused by the way words and expressions are ordered or the way they are connected with each other.⁸² Syntactical deficiencies usually have the character of ambiguity. As already mentioned two or more conditions may be connected either conjunctively creating a narrow concept or disjunctively introducing a broader concept.⁸³ There may be doubts as to which part of the main clause a relative clause is related.

Where we suddenly find that a term is 'open' there is an *epistemological problem* to be dealt with through interpretation.

Ross mentions thirdly what he calls "*logical problems*".⁸⁴ Inconsistencies are problems belonging to this category. *Total inconsistency* is said to be at hand where exactly the same factual conditions (operative facts) are assigned incompatible legal effects. One norm can never be applied without the other being at the same time violated. According to Ross *partial-partial inconsistency* exists in the case of overlapping norms where both norms have partly the same field of application where they will stipulate incompatible legal effects to identical acts, events or situations and partly completely separate fields of application where no conflict will arise. *Total-partial inconsistency* is present where there is both a general rule and a divergent particular rule. This is more commonly referred to as legally valid exemptions to a general rule. Inconsistency will be less frequent with the respect to norms embraced by the text of the same legal instrument, this is clearly the case with total inconsistency. Inconsistencies are more frequent where the norms belong to separate legal instruments.

There are a number of statements by ratifying or acceding states which

indicate that where a norm in the treaty contradicts a norm in another treaty, one of them, usually the one formulated in the other treaty, shall have pre-dominance. On signing the 1965 Convention on Transit Trade of Land-Locked States, Belgium announced that:

"3. The Belgian Government intends, upon depositing its instrument of ratification of the Convention, to make a reservation concerning the rights and obligations of Belgium arising from its adherence to certain international treaties relating to economic matters or trade."⁸⁵

In the end no such "reservations" were formulated when Belgium ratified the Convention.⁸⁶

On other occasions a state may only declare that two norms which possibly may contradict each other shall be reconciled. Belgium stated on ratifying the 1966 Convention on Racial Discrimination that it

"... considers that the obligations imposed by article 4 [concerning inter alia propaganda] must be reconciled with the right to freedom of peaceful assembly and association. Those rights are proclaimed in articles 19 and 20 of the Universal Declaration of Human Rights and have been reaffirmed in articles 19 and 21 of the International Covenant on Civil and Political Rights."⁸⁷

It may be doubted whether these examples of inconsistencies are to be counted at all as cases of interpretation. They would more properly be called problems of application. Two norms may be said to exist because both fulfil the requirement of formal validity, the problem is that they are inconsistent. The operation of one of the norms will be frustrated completely or partially. The principles of *lex posterior* and *lex specialis* will to a certain degree help to settle the problem of inconsistency.⁸⁸ Any party may apply any of the formally valid norms, but another party is not forced to accept it. This may only become the case when we have a legally binding decision in the matter.

Statements by contracting states which bear upon total or partial inconsistency (irrespective of whether they are classified as declarations of interpretation or as separate declarations of application) are not to be considered as reservations. This is definitely so if the inconsistency is internal, between norms in the same instrument. It should also be the case where the inconsistency is external, between norms belonging to distinct instruments. The reasons are the same for not considering declarations of interpretation as reservations. The nature of a statement concerning the relations between two inconsistent norms can only be determined once the prevalence of one of the norms has been authoritatively determined. Strictly seen a statement of the actual kind could not be termed an interpretative declaration. It is not a question of extracting a norm from a norm formulation, but of deciding which of two norms already established by the reading of the legal texts is to prevail over the other.

Redundancy is further treated by Ross as a logical problem of interpretation. Apparently the same conditions (operative facts) are assigned through two separate formulations the same legal effect. The formulations are repetitive and therefore one of them is superfluous. There are two tokens of norm formu-

lations expressing the same norm. Redundancy is *complete* where the factual conditions mentioned in the formulations are identical. They are *partial* where one of the formulations covers a part of the factual conditions indicated by the other. A redundancy of the partial kind is to be found in the reservation by North Viet Nam mentioned above.⁸⁹ Either the term "prosecuted" or "convicted" is superfluous. The present redundancy is two-sided. If prosecution is enough to free North Viet Nam from the duty under the III Geneva Convention the term "convicted" is unnecessary, because the freedom from convention obligations according to the reservation works from the beginning of the criminal proceedings. It becomes irrelevant if and what kind of statement is pronounced. If conviction is required the term "prosecuted" is superfluous as there is no conviction without prior prosecution.⁹⁰

Finally, Ross mentions *defective presuppositions* as creating problems of interpretation of a logical kind.⁹¹ Treaties just as other legal compacts regulate a certain subject-matter presupposing that certain facts or situations are present. The Geneva Red Cross Conventions regulating the humanitarian law of war provide protection to all installations carrying any of the three emblems: The Red Cross, the Red Crescent, and the Red Lion and Sun. The obligation to respect these emblems naturally presupposes that the states having used them still intend to recognize them. Iran has been the only country which has made use of the right to invoke the inviolability of the emblem of the Red Lion and Sun. The protection and immunity that this emblem is to provide naturally depends on the fact that Iran still wishes to use this emblem. The Khomeini government has now informed the ICRC that it does not any longer maintain the emblem of the Red Lion and Sun but will instead use the Red Crescent as do the other Islamic states.⁹² The result is that the duty to respect the emblem of the Red Lion and Sun has lost its object. The question of the validity of the norm requiring inviolability for this emblem may be actualized if the situation was to arise that supporters of the Shah's family would succeed in bringing about a civil war in Iran which becomes internationalized. If another state would formally declare that it will no longer respect the emblem of the Red Lion and Sun, it would not be possible to call it a reservation (disregarding the exceptional case mentioned above).

Defective presuppositions are better not treated as problems of interpretation because they concern the presence of operative facts and not the understanding of a linguistic formulation. It is submitted that what Ross considers as logical problems of interpretation, except perhaps redundancy, are strictly seen not cases of text interpretation but of norm application. However the so-called 'methods of interpretation' govern both activities.⁹³

25.7 THE MEANS, AIMS AND METHODS OF THE INTERPRETATION OF TREATIES

When trying to find out if a statement is a reservation or only a declaration of interpretation we will have a certain acquaintance with the recognized methods of interpretation. Applying them will help us to grasp the norm that

is to be expressed by the relevant provision and decide if a statement restates the norm or derogates from it.

International legal doctrine, commentaries to treaty drafts, international legislation (the drafting of treaties) and judicial dicta have at length tried to elucidate the methods of international interpretation.⁹⁴ Not least the principles of the Vienna Convention have been the subject of intricate deliberations. The rules of the Vienna Convention reflect a clear preference for the method of relying on the text of the treaty when establishing the applicable norms.⁹⁵ The Convention conceives the textual interpretation broadly. It mentions in the first place the literal interpretation according to which words and expressions of the treaty have to be understood in their ordinary meaning. If the single expressions do not make sense, they have to be read in conjunction with the other parts of the treaty as well as the annexes and the preamble. These, together with additional agreements and instruments entered into by all parties in connection with the conclusion of the treaty, form the context. The Vienna Convention thus apprehends the contextual interpretation in quite narrow terms. It recognizes also the teleological interpretation as it requires that notice is to be taken of the object and purpose of the treaty. The often lengthy preambles of universal treaties provide guidance as to what is considered as the object and purpose of the treaty. Article 31(4) admits the possibility of going against the literal meaning of an expression by invoking a specific meaning. However, the onus of proving that the parties intended to give an expression a special meaning lies on the state invoking such a meaning.⁹⁶ The drafters of the Vienna rules on interpretation were eager to circumscribe the use of the teleological method by clarifying how the object and purpose should be established. There has been a marked reluctance to go so far as to accept the principle of effectiveness (*ut res magis valeat quam pereat*) which requires that treaty provisions should be given the fullest effect.⁹⁷ The need to take cognizance of the intention of the framers of the treaty has not been explicitly mentioned. This does not mean that the opinions of the framers are irrelevant. The intention is most reliably and objectively reflected in the individual formulations and the wider context.⁹⁸ One has to recognize that the literal, contextual, teleological and intentional methods are integrated in a single general rule, where it will be difficult to isolate the different methods from each other.⁹⁹

The treaty text and supplementary formal agreements as found in the originals, certified copies, official national and international treaty collections are the tangible means of interpretation. The preparatory work has been downgraded to simple supplementary means of interpretation in article 32 of the Vienna Convention. The reason for this is not that the method of intentional interpretation has been condemned as less significant than the other methods of interpretation. On the contrary, the scepticism towards the preparatory work is due to its unreliability in establishing the common intention ('objective' intention) of all the states participating in the treaty which ought to be the aim of the interpretation. This has the effect that the common intentions behind a treaty are somehow detached from the individual and real motives of each single participating state. During the elaborations of the provisions on interpretation it was contended that the recorded opinions

of state representatives and experts during the elaboration, negotiation and adoption of the treaty text may be unreliable as proof of the actual views of the negotiating states. Views represented at the beginning of the conference may be changed at a later moment without this being detectable in the minutes. Certain utterances may be advanced for propagandistic and political purposes not really expressing the real view of the negotiating state. The minutes of the conference will not give a just picture of the predominant view on certain matters. Some states are represented by large delegations with a considerable number of experts, which may propagate one and the same view with an arsenal of different arguments presented on separate occasions. Such states will also be able to make public their views on each question that comes up for consideration. States which can only afford small delegations, having only a few experts at their disposal, will not be able to comment on each question.¹⁰⁰ Not all topics and questions come to a vote where a position may be demonstrated in a recorded vote. However, not even a vote may be conclusive as to the position of a state on a particular question.

The World Court has chosen a restrictive and prudent attitude towards the preparatory work as means of interpretation. A very reserved position is to be found in the *Lotus* case and the *Acquisition of Polish Nationality* case.¹⁰¹ In the *Admissions* case the ICJ did resort to the preparatory work but only because the obscurity of the text could not otherwise have been remedied.¹⁰²

The preparatory work gains an independent significance if the means and methods under the general rule of interpretation under article 31 leave the meaning obscure, or where the result is absurd and unreasonable. In such situations we may find explicit reference to the preparatory work in the assertions of a tribunal. There is a strong feeling that the preparatory work is often consulted even though this is not stated in the judgements or awards. This is likely to happen where the preparatory work confirms the result to which the tribunal has come by using the primary methods and means.

The question of interest in this connection is if the preparatory work will provide some guidance for determining the nature of a statement which concerns an imprecisely formulated provision. How far may one rely on the preparatory work in order to establish the norm expressed by an imprecise formulation and hence to determine if the statement is clarifying a text or modifying a norm. The preparatory work may show if the meaning of the relevant formulation has been considered. The minutes of the negotiations may show that different views have been presented as to the reading of the provision. In that case it is not possible to declare one of these views as representing a valid interpretation. Consequently, it is not possible to construe the statement expressing another view as a true reservation. Even if the only views expressed in the matter favour one interpretation, we are still unable to consider a statement to the contrary as a reservation. The silence of the other negotiating states cannot automatically result in a binding acceptance of the opinions expressed. It will only have the status of one argument out of many when trying to prove that there has actually been an agreement as to the correct interpretation. Even if a great majority of the negotiators support one interpretation, this will only have the character of a more weighty argument for the correctness of the interpretation but not that of conclusive proof. It

will seldom occur that the near-unanimity of the participating states openly declare their standing in the question.¹⁰³ Where the correct interpretation is not formally established there remains the basic problem of deciding how wide a support an interpretation has to achieve in order to be counted as a correct one. Is unanimity or near-unanimity required, or is some majority, perhaps the majority for adopting the treaty text, needed? No clear answer may be found and besides there will probably be no recorded votes on this.

A further problem is that states later acceding to a multilateral treaty will not have a chance to see their individual views being represented in the preparatory work. Nor can it generally be presumed that an acceding state has acquiesced in the views expressed by the negotiating states and registered in the proceedings of the conference. It may happen that the acceding state has not had access to the preparatory work. In the past, acceding states had been considered to enjoy a special favour if invited by the original parties to accede to the treaty, it being understood that this was to happen on the conditions set forth by these states. This same attitude also explains why reservations by acceding states were received with especial irritation. Nowadays, it is not convenient to treat acceding states as second-rate parties whose intentions and ideas for participating in the treaty may be neglected.

Once again it must be stressed that any individual apperception of the language found in a treaty provision and determination of the nature of a statement is but a conjecture which will need confirmation through a procedure that leads to an authoritative interpretation.

25.8 GUIDELINES TO BE FOLLOWED WHEN DOUBTS ARISE AS TO THE ACTUAL NATURE OF A STATEMENT

25.8.1 Analysis of the object of statements: The provisions of the treaty as norm formulations

A statement which 'excludes' a provision undoubtedly strives to alter a treaty norm irrespective of whether the provision is clear or imprecise as to the contents of the norm. By 'excluding' a provision, an article, a paragraph or subparagraph, the norm as expressed by the provision, be it any kind of right or obligation, is denied and replaced by an opposite norm. An 'excluding reservation' propounds an opposite norm but is not supposed to abrogate the regulation of the subject-matter. The reserving state certainly does not want to create any doubts that it propagates a right (for example a liberty) instead of an obligation (a duty). As a statement which 'excludes' a provision bears upon the force of a norm, it does not really matter if the formulation used in the provision is imprecise and creates certain doubts as to the contents of the norm.¹⁰⁴

'Modifying reservations' which alter the contents of a norm are less easily distinguished from declarations of interpretation or policy. The nature of such a statement may be ascertained only where the scope of the treaty norm is proven.

Article 57 of the 1982 Convention on the Law of the Sea appears to be

unequivocal as to the outer limit of the exclusive economic zone when it states that:

"The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured."¹⁰⁵

If a state ratifying the Convention declares that it will extend the outer limit of its economic zone in a specific area to, let us say, 250 nautical miles from the baseline, this will definitely constitute a derogation from the treaty norm and thus a reservation.

Mostly provisions as norm formulations have a certain degree of obscurity, permitting alternative interpretations. Take for example paragraph 3 of article 121 of the new Law of the Sea Convention which provides that:

"Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive zone or continental shelf . . ." ¹⁰⁶

Now the expression "cannot sustain human habitation or economic life of their own" seems to be ambiguous. Does the provision mean to denote rocks that for the time being (at the moment of delimiting the continental shelf or the economic zone) are unable to sustain human habitation or economic life of their own, or does it signify that even in the future they have to be uninhabitable and unexploitable due to the impossibility of developing them? On signing the 1982 Convention Iran made a statement with regard to article 121:

"Isles situated in enclosed or semi-enclosed seas which *potentially* can sustain human habitation or economic conditions, resource restriction or other limitation have not yet been put to development, fall within the provisions of paragraph 2 of article 121 concerning 'Régime of Islands', and have, therefore, full effect in boundary delimitation of various maritime zones of the interested Coastal States." (emphasis added) ¹⁰⁷

This statement cannot be said to be a definitive derogation from a clearly specified norm. It would therefore be more convenient to consider it as a formal understanding of an imprecise formulation.

The more abstract the formulation of a provision, the bigger are the chances for a statement to be merely interpretative. The identical articles 1(1) of the two UN Human Rights Covenants gave the right of self-determination a very sweeping formulation:

"All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

On acceding in 1979 to the Human Rights Covenants India declared:

"... that the words 'the right of self-determination' appearing in (this article) apply only to the peoples under foreign domination and that these words do not apply to sovereign independent States or to a section of a people or nation – which is the essence of national sovereignty."¹⁰⁸

France, the FRG and the Netherlands "objected" to the Indian statement, although it must be considered to be an interpretative declaration. The concept of self-determination is quite an obscure one and opinions vary a lot as to its actual scope.¹⁰⁹

The impreciseness of a provision may have been unforeseen and undesired. It is evident that in such a case a unilaterally presented interpretation cannot be labelled as derogatory to the affected norm. The framers of a treaty may not be able to discern all the particular questions related to the subject-matter under regulation. There is no fully reliable indication of how the drafters would have clarified the norm formulation had they been aware of them.

The drafters of a treaty text may have been conscious of the defects of the norm formulation, but unable or unwilling to agree on a clarification in one direction or the other. There may have been opposing proposals to amend the draft in order to clearly state the contents and the scope of an obligation and of the respective right. If none of these proposals achieves the required majority of votes the relevant provision will remain obscure. Thus it cannot be contended that the negotiating states 'had the intention' to regulate the question according to any of the proposed solutions. It may only be asserted that the particular question has not achieved a definitive regulation but remains still pending. If a state later giving its consent to the treaty declares that it will apply the imprecise provision in accordance with one of the rejected amendments it cannot be construed as being a derogation from a norm, because the scope of the norm has not been bindingly delimited in this respect. It cannot be asserted that the statement represents a valid understanding of the provision, but neither can it be asserted that it is a wrong understanding which would be derogatory to the norm. The rejection of the amendments that would have done away with the impreciseness of the treaty provision signifies only that the time was not yet ripe for a solution of the problem. A state expressing its support for one of the interpretations among a number of interpretations that have failed to become accepted, only informs of its will to maintain its original position in the question. The reason for such a statement may be to avoid the situation where another party will contend that practice has come to prove that an opposite interpretation has been recognized as the correct and valid one. If a statement in the above-mentioned case was equated with a reservation it would seem strange to construe passivity as tacit acceptance where a reliable majority has openly opposed the interpretation by rejecting an amendment confirming it as a binding one.¹¹⁰

A related case is at hand when states that have not participated in the negotiations on a treaty later adhere to it. The negotiating states may have agreed to understand an imprecise provision in a certain way. The adhering state may question the binding nature of this interpretation. The Soviet Union declared on signing and ratifying Protocol II of the Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco) that the transit and transport of nuclear weapons through the demilitarized zone would be contrary to the objectives of the treaty. A similar reaction came from the People's Republic of China. The question of transit and transport had been discussed during the elaboration of the treaty text. At the 4th session of the

Preparatory Commission for the Demilitarization of Latin America Argentina proposed that an express prohibition against transport and transit should be included in the treaty. This proposal was rejected. Instead the Commission stated in the Final Act of the 4th Session that the general prohibition against any kind of possession of nuclear weapons by the contracting parties implied

- (a) for the states parties that they consequently were not allowed to “transport” nuclear weapons on their carriers
- (b) for the states not parties but accepting the additional Protocols “transport” is identical with “transit” and in the absence of any provision to that effect, external states are not bound by any prohibition against “transit” of nuclear weapons, provided that the territorial state grants such transit rights.¹¹¹

The US government has consistently manifested its support for this view, through their observers at the negotiations and later when signing and ratifying the Additional Protocols.¹¹² The question if an acceding or adhering state can be considered to be bound by the views to be found in the preparatory work is an open one.¹¹³ However in the present case it is not possible to maintain a Soviet Union acquiescence in an understanding agreed upon by the negotiating states. The Soviet government did not participate in the negotiations and is thus not bound by any majority decisions on the adoption of the text. It has voiced its disapproval both on signing and on ratifying Protocol II. Even if there is evidence that the view of the United States will be the prevailing one neither the Soviet Union nor the People’s Republic of China can automatically be assumed to be bound by the interpretation. The present disagreement is one of interpretation and neither the US declaration nor the declarations by the Soviet Union can be qualified as reservations.

What are the practical effects of the Soviet declaration? When the Soviet government contends that transit and transport of nuclear weapons are prohibited it naturally assumes that same obligation for its own part. If a contracting party would permit transit of nuclear weapons the Soviet Union could declare such an act as incompatible with the objectives of the treaty and leave the Soviet Union free to “consider its obligations under Protocol II” and “reconsider its attitude to this Protocol”. In the worst case the Soviet Union would terminate its obligations under the Protocol. A more natural reaction would be to try to profit itself from the right of transit and transport as it is quite evident that the US will have nuclear weapons in transit in the zone.

Where the meaning of a specific provision is obscure, two or more interpretations may be presented. For each of these possible interpretations a certain number of pro and contra arguments may be presented. Once the interpreter has evaluated the tenability of an interpretation by adding and weighing the arguments for and against, he will decide which of the interpretations he considers to be the most reliable prediction of a possible future solution being recognized as authoritative and binding by the parties to the treaty. If a statement concerning an imprecise provision does not tally with the result of such a weighing operation the probability that the statement amounts to a

reservation has increased. However only from the moment one of the interpretations has been authoritatively established as the correct one may the character of the statement be definitely determined.

An interpretation may become authoritative and valid in the sense of binding the parties to the treaty once a dispute as to the correct interpretation has been settled through judicial procedure. It must not be forgotten that decisions of the World Court are according to its statute only binding with regard to the parties to the dispute and the intervening states.¹¹⁴ On the other hand, the parties not intervening may, although not formally bound by the decision, find it difficult to assert an opposite interpretation. Where treaties expressly provide for the compulsory settlement of disputes on interpretation it must be assumed that the parties by accepting such a clause also recognize the verdict on the correct interpretation in spite of not being a party to the dispute. Interpretations of provisions in constitutional treaties will often be authoritatively settled by the organs of the organization.

An interpretation may also become authoritative where a subsequent agreement is reached on the question. Article 31(3)(a) of the Vienna Convention speaks of agreements between the parties to the treaty. The provision does not say anything as to how the agreement has to be reached. Is unanimity required or not? Where all parties agree to the interpretation no problems arise. However, in such a case there will probably be no divergent statements of interpretation. The interpretation must also be considered authoritative if agreed upon according to the procedure to which all have consented. An interpretation agreed upon by majority decision just as the adoption of the treaty norms will be authoritative and binding. From the moment when a subsequent agreement establishes an interpretation as the right one, a statement advocating an opposite interpretation would qualify as a reservation.

It does occur that an agreement as to the correct understanding of words and expressions is reached in connection with the conclusion of the principal treaty. Usually this will be done according to the same procedure as for the adoption of the main text. This is naturally so when the clarification of certain terms is given in the treaty text itself, as for example in the 1965 Convention on Transit Trade of Land-Locked States (article 1) but also where this is done in an annexed instrument. In connection with the adoption of the 1982 Law of the Sea Convention a number of supplementary instruments were agreed upon, one of which clarifies a number of expressions used in the Convention.¹¹⁵ The negotiating states may also agree on some basic principle which will be important when applying the various provisions of a treaty. A common understanding was adopted when signing the 1978 Convention on the Carriage of Goods by Sea at the Conference in Hamburg:

"It is the common understanding that the liability of the carrier under this Convention is based on the principle of presumed fault or neglect. This means that, as a rule, the burden of proof rests on the carrier but, with respect to certain cases, the provisions of the Convention modify this rule."¹¹⁶

Supplementary interpretative agreements often termed 'Annexes' or 'Proto-

cols', have the same binding force as the main treaty to which they refer.¹¹⁷ Where a statement concerns the interpretation of a provision containing one of these expressions it may be determined if the statement amounts to a derogation or an affirmation of the treaty norm by consulting the clarification provided by the agreement of interpretation.

25.8.2 Analysis of the statements themselves

In the preceding subchapter the case was discussed where the effects of the statement were unclear due to the impreciseness of the treaty provisions to which they referred. The nature of the statement could not be asserted because there were doubts as to the norm that was the object of the statement. This deficiency may also be found in the formulation of the statements themselves. Confronted states are quite often wavering as to the intentions behind the statement. This concerns especially declarations of policy, which may be distinguished from declarations of interpretation by their degree of generality. General declarations of policy may have an impact on the interpretation and application of a treaty. Some confronted states may assume that the national policies or doctrines are in harmony with the treaty commitments of that state. Others feel that such statements amount to a *carte blanche* for any derogation from treaty obligations which would turn the statement into some kind of qualified reservation.

The government of India ratified the 1948 Convention on the Inter-Governmental Maritime Consultative Organization on 6 January with the following statement.¹¹⁸

"In accepting the Convention on the Inter-Governmental Maritime Consultative Organization, the Government of India declares that any measures which it adopts or may have adopted for giving encouragement and assistance to its national shipping and shipping industries (such, for instance, as loan-financing of national shipping companies at reasonable or even concessional rates of interest, or the allocation of Government-owned or Government-controlled cargoes to national ships or the reservation of the coastal trade for national shipping) and such other matters as the Government of India may adopt, the sole object of which is to promote the development of its own national shipping, are consistent with the purposes of the Inter-Governmental Maritime Consultative Organization as defined in article 1(b) of the Convention."¹¹⁹

The Indian statement consists in fact of three parts: The first cited above, relates to the purpose of the IMCO Constitution, the second to the role of recommendations and the third to the relationship between obligations under the IMCO Constitution and the municipal laws of India. The Indian statement, not least its first part, created a dispute as to its real nature. The UN Secretary-General exercising the functions of the depositary for the IMCO Constitution believed it to constitute a reservation and decided that it had to be circulated among the members of the IMCO for approval before he could accept the instrument of ratification for definitive deposit.¹²⁰ France declared that it "expressed its opposition to the reservation" contained in the Indian

statement and further that it was "unable to accept the wording of the Indian reservation".¹²¹ The Federal Republic of Germany stated that it was not possible to "reconcile the Indian reservation with the general principles of shipping policies and with the purposes of the IMCO" and that "they are inconsistent with article 1(b) of the IMCO Constitution and hence with the declared purposes of the Inter-Governmental Maritime Consultative Organization".¹²² On the other hand, the United States was of the opinion that no part of the Indian statement constituted a reservation.¹²³ After lengthy discussions in the UN General Assembly and its VIth Committee, which dealt with many questions such as the Indian complaint over the procedure followed by the Secretary-General, the functions of the Secretary-General as depositary, the interpretation of resolution 598(VI), the competence of the General Assembly to interpret the IMCO Constitution and the unanimity rule, the Indian delegate announced that the Indian statement did not contain any reservations but was actually a declaration of policy.¹²⁴ On the basis of this clarification the Council of the IMCO was able to pass a resolution accepting India as a member of the organization but stressed at the same time that the Indian statement had "had no legal effect" with regard to the interpretation of the Constitution.¹²⁵ The Council thus made it clear that it considered the Indian statement to be only an indication of how the Indian government was to understand and apply the IMCO Constitution without having any binding effect on the other member states. According to article 55 of the Convention any dispute concerning the interpretation of the Convention shall be referred for settlement to the Assembly or settled in any other manner as the parties to the dispute agree (for example referring it to the Council). India must be deemed to have acquiesced in this understanding of the Council as to its statement.¹²⁶

Identical statements were later presented by Cambodia (3.1.1961), Indonesia (18.1.1961), Malaysia (17.1.1971) and Sri Lanka (6.4.1961).¹²⁷ Owing to the prior discussions on the Indian statement the governments of the United Kingdom, Norway and Greece declared that they assumed the Cambodian and Indonesian statements to be mere declarations of policy but not real reservations.¹²⁸ At least as concerns the first parts of the statements, Cambodia and Indonesia admitted that they were not proper reservations. Cambodia accepted the contention that this part of her statement was of a political nature. Indonesia declared her statement to be an interpretation but emphasized at the same time that it would not "accept the assumption . . . that this declaration has no legal effect with regard to the interpretation of the Convention".¹²⁹ Malaysia and Sri Lanka delivering their declarations ten years later thought it necessary to notify the Secretary-General that their statements were only a declaration of policy (Malaysia) respectively a declaration of interpretation (Sri Lanka).¹³⁰

Quite frequent are those statements which declare that the provisions of the treaty will apply only to the extent they are in conformity with the constitution or the national legislation of the declaring state. On ratifying the 1966 Convention on Racial Discrimination in 1977 Guyana stated:

"The Government of the Republic of Guyana do not interpret the provisions of this

Convention as imposing upon them any obligation going beyond the limits set by the Constitution of Guyana or imposing upon them any obligation requiring the introduction of judicial processes going beyond those provided under the same Constitution.”¹³¹

The confronted states will be at pains deciding if the statement means any derogation from the treaty norms or not and that such statements should therefore be avoided. The proposal within the OAS for so-called reservations of theoretical adherence was rejected because of these inconveniences.¹³² Within the treaty system of the Council of Europe there is, according to a number of reservation clauses, a duty for the reserving state to deliver the texts of the national laws which are not in conformity with the treaty commitments and which have been the cause of the reservation.¹³³ The confronted states can thus determine (if and) to what extent the reserving state will derogate from the treaty norms.

Where confronted states remain in doubt as to the purpose of the statement, they may naturally require a clarification from the declaring state. This is more easily done where the statement is communicated at the moment of collective signing of the treaty. However, where statements are attached to later signatures, to ratifications or to accessions, the other states as a rule do not ask for further information. It is more likely to occur in such special procedures as in the OAS where the Secretariat as depositary communicates the text of the statements to the other interested states before the relevant instrument is accepted for final deposit. The Secretariat may independently require the declaring state to clarify its views. The rule is that only reservations but not declarations will have to undergo the consultation procedure.¹³⁴ Even the Secretary-General of the United Nations occasionally begs the declaring state to provide complementary information.¹³⁵ The uncertainty of a confronted state is sometimes demonstrated, as was the case with Australia when faced with the statements by Bulgaria, Byelorussia, Romania, Ukraine and the USSR to article 23 concerning warships in innocent passage of the Territorial Sea Convention:

“If the statements referred to above with regard to article 23 are juridically in the nature of declarations rather than of reservations strictly so-called the objections recorded by (the Government of Australia) will serve to record disagreement with the opinions so declared.”¹³⁶

It may well be possible that the declaring state itself is not fully aware of the effects of its statement. This is more likely in the case where the statement resembles more a declaration of policy than a declaration concerning the understanding of a particular provision. It may be asked whether the United States has always had a clear conception of the effects of its statements invoking the Monroe doctrine on individual treaty norms. Such a statement was made by the US to the 1907 Hague Convention (I) on the Pacific Settlement of International Disputes:

“Nothing contained in this Convention shall be construed as to require the United States of America to depart from its traditional policy of not intruding upon,

interfering with, or entangling itself in the political questions or policy or internal administration of any foreign State; nor shall anything contained in the said Convention be construed to imply a relinquishment by the United States of America of its traditional attitude towards purely American questions.”¹³⁷

It has occurred that a ratifying state has itself been at pains to make up its mind whether to formulate a reservation or to present an interpretative declaration. The Netherlands government was not sure when ratifying the Human Rights Covenants if its national legislation and the legislation of the Netherlands Antilles were in conformity with the commitments under the Covenants. With regard to the Covenant on Economic, Social and Cultural Rights the Netherlands settled the problem by designating its statement concerning article 8(1)(d) on the right to strike as a proper reservation.¹³⁸

“(The Kingdom of the Netherlands) clarify that although it is not certain whether the reservation . . . is necessary, (it) has preferred the form of a reservation to that of a declaration. In this way the Kingdom of the Netherlands wishes to ensure that the relevant obligation under the Covenant does not apply to the Kingdom as far as the Netherlands Antilles is concerned.”

The choice of the Netherlands to cast its statement in the form of a reservation, signifies that there will be no obligation at the international level to ensure the right to strike to officials of central or local government organs of the Netherlands Antilles. However, the formulation of the relevant provision would suggest that the statement as to its contents does not contravene the norm guaranteeing the right to strike:

“1. The States Parties to the Present Covenant undertake to ensure:

(d) The right to strike, provided that it is exercised *in conformity with the laws of the particular country.*” (emphasis added)

As the right to strike may thus be subject to restrictions provided that they are in accordance with the local laws, the Netherlands statement does not derogate from the obligation to ensure the right to strike under the Covenant, but actually reflects a correct reading of the provision. The statement does with respect to its contents qualify better as an interpretative declaration.

What the Netherlands government has achieved by preferring to formulate a reservation is that the right to strike in the Netherlands Antilles for certain groups is not guaranteed on the international level. This would anyway have been the case due to the relevant statutes and legal practice in the Netherlands Antilles. The striking of civil servants has been considered an office misdemeanour (*ambtsmisdrijf*) under the 1913 Criminal Code of the Netherlands Antilles. According to article 374 a of the Criminal Code:

“A civil servant who, with a view to creating or prolonging obstruction in the exercise of a public service, fails or refuses to perform a task given and which he is expressly or by virtue of his office obliged to perform, shall be liable to a maximum sentence of six months imprisonment or a fine not exceeding three hundred guilders.”¹³⁹

Although legal practice supports the principal rule that civil servants are not allowed to strike, it has lately been admitted under certain exceptional circumstances.¹⁴⁰ Only in the case where the right for governmental officials to strike would not have been curbed by the local laws, the statements would have had the effects of a reservation.

Perhaps the only profit gained by choosing the form of a reservation was to debar the Economic and Social Council of the UN or the Commission on Human Rights from considering the question of the right to strike for governmental officials in accordance with the provisions of Part IV of the Covenant. In order to protect oneself from an interpretation that governmental officials in the Netherlands Antilles would have a right to strike according to article 8, the formulation of an express reservation is not required. If by any chance this opposite interpretation is authoritatively established as the correct one, the confronted states will be bound by the rules on objection and tacit acceptance only from the date this decision is made. The Netherlands statement could possibly be construed as an interpretative declaration which is a potential reservation. Should the Netherlands interpretation be established as incorrect, the statement acquires the character of a reservation and the whole reservation regime comes into operation with its rules on acceptance and objection.¹⁴¹

25.8.3 Where declaring and confronted states differ in opinion

As we have seen the authors of identical or similar statements may have different views as to the nature of statements. This has already been illuminated by the four statements to the IMCO Constitution. If we take the third part of these statements purporting on the relationship between the convention norms and the national legislation, India and Malaysia admitted it to be a "declaration of policy", Indonesia and Sri Lanka an "interpretation", whereas Cambodia insisted that its statement to this part should be construed as a "reservation". Similar uneasiness is to be recognized with respect to the various statements bearing upon article 19(2) of the Civil and Political Rights Covenant on the freedom of expression, especially the freedom of information. Various ratifying states had to make up their minds as to how their licensing of radio and television broadcasting conforms with the freedom of information. Some states thought it necessary to designate their statements as reservations, such as France and the Netherlands, others, such as Australia and Italy termed their statements as interpretative declarations. Most ratifying states have some kind of licensing or monopoly system but apparently thought this not to contradict the obligations under article 19(2) to guarantee the freedom of information. For example none of the Nordic countries thought it necessary to make any statement in this respect.

Neither do the confronted states always share the same view. In the often cited case of the Indian statement to the IMCO Constitution, France and the FRG on one side and the United States on the other side had different views on the nature of the Indian statement.¹⁴² The statements made to article 14 and/or 23 relating to innocent passage of warships and which had the effect

of safeguarding the coastal states' competence to require prior authorization from foreign warships wishing to pass through the territorial sea were reacted upon in the following way: Denmark, Madagascar and Thailand made formal objections to what they considered to be plain reservations. Australia's and the Netherlands reactions were more specified. Australia clarified that if the statements were declarations rather than reservations it will anyway disagree with them.¹⁴³ The Netherlands was ready to object ("do not find acceptable") to the statements as far as they amount to reservations.¹⁴⁴ These two states accepted the idea that the statements were possibly only interpretative declarations.

Of special interest is the case where a declaring state and a confronted state do not share the same view. The declaring state may contend that its statement is a reservation, whereas the confronted state is convinced that it is nothing but a unilateral interpretation. This is the case of the actions taken by Cambodia with regard to the IMCO Constitution. The French government presented declarations to articles 1 and 2(4) of the Continental Shelf Convention to which reservations were explicitly prohibited by the convention. Thailand came up with formal objections to what it called the French "reservation" to article 1. Most reacting states did accept the designation by France, but expressed their disagreement or reserved their position with regard to these interpretative declarations.

As all the parties are supposed to be equal, the view of each has to be accorded the same value and no view is therefore automatically imposable on the other. The question of the nature of a treaty (contractual or normative), the meaning of a treaty provision and the contents of a statement are basic questions that have to be settled authoritatively before one can decide if the rules on reservations will apply or whether the rules on interpretation together with the rules on acquiescence will be relevant. The ascertaining of the nature of a statement as either a reservation or an interpretative declaration is itself an activity that will have to follow the rules on interpretation. We have come back to the central question treated earlier that the application of certain rules is based on certain shared assumptions. If all states assume a statement to be a true reservation they will consider the reservation regime to apply. If on the other hand one state questions this assumption, an agreement must be achieved as to the nature of the statement; otherwise one has to live with an uncertainty as to the applicable rules.

It is desirable that confronted states or depositaries having doubts as to the characterization used by the declarant notify their doubts in order that the declaring state may become aware of the divergence of views and thus is given a chance to clarify the statement. This will help to determine which rules will be relevant. Unfortunately the obscurity of statements is seldom remedied and the participating states have to accommodate this fact.

25.8.4 Statements bearing on provisions to which reservations are not permitted

An argument presented occasionally is that states try to circumvent express

prohibitions against reservations by introducing "statements of interpretation". The French statement to articles 1 and 2 of the Continental Shelf Convention has been described as containing reservations in disguise.¹⁴⁵ Reservations are according to the Convention's article 12 not permitted.

This charge is not convincing. If a statement clearly modifies a norm in a treaty, it is a reservation. Owing to the express prohibition it must therefore be deemed to be null and void.¹⁴⁶ It is impossible that this reservation, designated as "interpretative declaration" due to the absence of formal disapproval (objection) would become tacitly accepted and opposable to all the other parties. A prohibited reservation cannot be accepted irrespective of the designation it has been given. The state formulating the inadmissible reservation becomes either a party to the treaty without the reservation, or if it does not abandon it, its instrument of final consent does not have any force and the reserving state does not qualify as a party. If the statement is but an interpretation, it does not modify the relevant norm to which reservations are prohibited. The statement expresses the understanding of the declaring state and cannot be opposed to the other parties after the expiry of a specific period, but only after the moment the interpretation has been bindingly recognized as the valid one. Most of the states reacting on the above-mentioned French statement considered it to be an interpretative declaration, which seems to be the correct view.¹⁴⁷

25.8.5 Practical reasons for stipulating a presumption against reservations

As long as the correct interpretation of a treaty provision has not been authoritatively established the parties to the treaty will individually seek to find out how a statement affects the treaty relations between the parties. A state party trying to make up its mind on the nature of a statement has to be aware of certain unreasonable and unacceptable consequences the presumption may have.

Especially during the period when the unanimity rule was prevailing, the presumption of reservation would have had certain absurd effects. A disapproval expressed by another state would inexorably bar the declaring state from participation in the treaty. The United States made a statement to the 1931 Convention on Manufacturing and Distribution of Narcotic Drugs. The United States communicated that its signature did not mean any recognition of a regime or entity which signs or accedes to the Convention, and further that there will arise no contractual obligations under the Convention between the United States and such an unrecognized regime or entity.¹⁴⁸ El Salvador responded to this statement on acceding to the Convention that it "disagrees with the reservation". The Salvadorian disapproval would, if the rules on reservations and objections according to the unanimity principle were applicable, exclude the United States from participation in the Convention. The Secretariat of the League of Nations having acted as depositary did not consider the US statement a reservation. That the United States was a party to the Convention has never been doubted.

A much discussed case was the statements made by certain signatories to the

Kellogg-Briand Pact concerning the relationship between the obligations under the Pact on the one hand, and the obligations under the Covenant of the League of Nations (mainly the obligations to participate in collective sanctions), the Locarno Agreement and other treaties and the right of self-defence on the other hand. Some of these statements had been the object of consultations between the signatories during the negotiations before the signing of the Pact. As far as concerns the signatories, these statements had been agreed upon. On ratifying the Pact the United States and the United Kingdom presented partly new statements relating to the understanding of self-defence, the former referring also to the Monroe doctrine and the latter clarifying its understanding that "... there are certain other regions of the world the welfare and integrity of which constitutes special and vital interest for our peace and security."

The Soviet Union had not been one of the original signatories to the Pact, but had been invited by the French government to accede to the treaty and did so on 31 August 1928. On accession it expressed disagreement with the "reservations" formulated by the signatories.¹⁴⁹ Would the Soviet disapproval have had the effect of an objection excluding the "reserving states" from participation in the Pact? If the statements were reservations would the Soviet Union as a later acceding state have been able to invalidate them in spite of the agreement between the signatory states? Certainly it was never intended by the Soviet Union that its disapproval would have the effect of an objection excluding those states from participation in the treaty and probably it was not even considered. The Soviet Union contended only that the statements not meeting with formal objections but only simple protests could not be opposed to the Soviet government.¹⁵⁰

It must be assumed that the signatories would not have tolerated that a state invited by them to accede to the Pact could exclude any signatory state having presented a formal statement from participation in the treaty. A weak point in the unanimity rule was, as already pointed out, that there was no clarity as to which states belonged to the 'interested states' having the right of objection. There had never been a definitive view as to whether later acceding states had the right to object to a reservation which had been expressly or tacitly accepted by all the other parties.

The majority of writers commenting on the statements to the Pact did not consider them to be reservations but merely interpretations.¹⁵¹ This was also the opinion of the foreign ministers presenting the views of their governments for the national parliaments.¹⁵² Only the Japanese government, according to Mandelstam, considered its statement to be a reservation.¹⁵³ Nor did the other states which expressed their disapproval of the statements, i.e., Egypt, Persia and Turkey, urge that their protests would have the effect of excluding declaring states from participation in the treaty. All the declaring states have been registered as being parties to the Pact and none of them had abandoned its statement.

To sum up, most arguments back the assertion that the statements to the Pact amount to interpretative declarations. The provisions of the Pact have been drawn up in such general terms that they seemed to express general principles more than concrete norms, thus leaving considerable room for inter-

pretation. Even the British statement reserving the United Kingdom a liberty to resort to self-defence in other regions of the world where its vital interests could be affected is more properly construed as an interpretation, although it was the statement that evoked the strongest criticism. In spite of the fact that the Soviet Union vehemently condemned the British statement which it called a "reservation", it apparently did not wish its disapproval to have the character of a formal objection. On the basis of the unanimity rule the Soviet Union could possibly have claimed that the parties making the statements were no longer parties to the Pact. The Soviet Union would, however, have been worse off itself in such a situation. Against the "reserving" states it could not invoke the norms under the Pact.¹⁵⁴ Considering the statements to be interpretations unacceptable to the Soviet Union, it had the possibility to invoke all parts of the Pact and maintain that the statements were unopposable because they were contrary to the very purposes of the Pact. It is a different question that a disapproving state may find it hard to have its view effectively confirmed.¹⁵⁵

Bishop enumerates a number of cases where governments being depositaries assumed obscure statements to treaties deposited with them not to amount to reservations.¹⁵⁶ This was the line taken by the Belgian government with regard to a US statement as to the monetary values set forth in certain articles to the 1924 Brussels Convention Relating to Bills of Lading for the Carriage of Goods by Sea. The British government acted in the same way with regard to the US "understandings" that the 1929 London Convention for the Safety of Life at Sea was not conflicting with the US Seaman's Act from 1915 and the United States government with respect to the Australian "reservations" to the 1944 International Sanitary Convention and the 1944 International Sanitary Convention for Aerial Navigation.¹⁵⁷ The instruments of ratification with the statements were received for definite deposit without consulting the other interested states. Bishop mentions just one example of an obscure statement understood to have been a reservation by the depositary. The British government as depositary of the 1937 Sugar Agreement did not accept the view that a US statement was not intended to be a reservation, but pended the US ratification in order to find out whether the other signatory governments objected to it.¹⁵⁸ The inquiry into the depositary practices of governments and international organizations compiled by the UN Secretary-General in 1964 shows that only the British and the US governments undertake an independent evaluation as to the real nature of an obscure statement.¹⁵⁹

With respect to the flexible rules on reservations the arguments speak in favour of the assumption of a doubtful statement to be an interpretative declaration. Even in this case the application of the rules on reservations may have unreasonable results. We have the case of the statements by five states to the IMCO Constitution which were opposed by six states.¹⁶⁰ If these disapprovals would have been construed as formal objections this would have the effect of excluding article 1(b) of the Constitution of the IMCO enumerating the fundamental purposes of the organization from operating between the declaring and the disapproving states.¹⁶¹ Now, however, treaties embracing constitutions of international organizations have been recognized to fall under

specific rules. The admissibility of reservations is decided upon by the organs of the organizations according to prescribed procedures. The IMCO Council was only ready to accept the Indian statement as a non-binding declaration of interpretation. This makes it clear that it had been considered to have the character of a reservation it would not have been accepted. The result of the rejection would be the barring of the five declaring states from membership in order to avoid the absurd situation where the basic provision on the aims of the organization was excluded from applying. There are other treaties where statements concern the central provisions clarifying the concepts underlying the operation of the whole norm system of the treaty. The non-application of these parts would make the entire treaty ineffective.¹⁶²

The statements made by Indonesia to the High Seas Convention and by Canada, France, Spain and the FRG to the Continental Shelf Convention would obstruct the implementation of the convention norms were they construed as reservations. All these statements had been disapproved by a number of states.¹⁶³ With respect to disarmament treaties there is a special interest in presuming statements not to be reservations. Would disapprovals to such statements be given the effect of formal objections, disarmament treaties might easily lose their significance. France declared on signing Protocol I to the 1967 Tlatelolco Treaty on the Prohibition of Nuclear Weapons in Latin America that the obligations under the Protocol shall not apply to transit of nuclear weapons across French territories in the zone. The Soviet Union has expressed its disagreement with the French statement. If the disapproval of the Soviet statement had been given the effect of an objection the whole application of article 1 may have been jeopardized. However, according to Article 27 of the Tlatelolco Treaty, reservations are not permitted. As a reservation the French statement would be invalid. If France should not wish to abandon its statement (conceived as a reservation) she would remain external to the denuclearization regime which goes against the interests of all the participating states.¹⁶⁴

CHAPTER 26

THE PRACTICE CONCERNING INTERPRETATIVE DECLARATIONS AND DOUBTFUL STATEMENTS

In order to find out if some practice has developed with respect to declarations short of reservation and statements where there is uncertainty as to their actual nature a more comprehensive survey is required. Naturally it cannot be a question of giving a complete coverage of those cases where this question may have been brought up. One has to be content with a sample of examples from the more interesting treaties where statements have been more frequent.

It is important to stress the fact that most confronted states do not react to reservations, interpretative declarations or statements of an obscure nature. The contention that the passivity of the majority of the confronted states must be construed as general acquiescence in the rule that there is an obligation to protest an interpretative declaration or disapprove a statement with an indeterminate character, is not well founded. The very difficulty in deriving from inaction an acquiescence in the presence of a norm was upheld in the *Lotus case*. Normally positive acts and not simple abstentions will be required to constitute practice turned into binding custom.¹ Where abstention is the basis for the development of a customary legal norm, there has to be overwhelming proof that the abstention is motivated by consciousness of a duty to abstain.² As stated in the *Fisheries case*, absence of protest with respect to acts by other states is not to be established as acquiescence because the other states may not know of the practice or they may be indifferent for various reasons.³ Only where the act affects the vital interests of another state, may abstentions from countering reactions be established as acquiescence.⁴

26.1 A SELECTION OF STATEMENTS RELATING TO CERTAIN MULTILATERAL TREATIES

The following selection of cases relate to 19 provisions in 14 conventions deposited with the United Nations Secretary-General. Some of the examples do not seem to present any problems, but most of them do. The declaring state may have some doubts whether to choose either the form of a reservation or of a simple declaration. Confronted states may have a similar doubt as to the substance of a statement which cannot be remedied by the clear designation by the declaring state. Finally, we have the 'objective' incertitude where declaring and confronted states have divergent views on the nature of a statement.

A. Convention on Diplomatic Relations (Vienna 18 April 1961)

Article 38(1)

"Except in so far as additional privileges and immunities may be granted by the receiving State, a diplomatic agent who is a national of or permanent resident in that State shall enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of his functions."

Statements by:

Sudan (13.4.1981)

"The Government of the Democratic Republic of Sudan reserves *the right to interpret* article 38 as not granting to a diplomatic agent who is a national of or permanent resident in the Sudan any immunity from jurisdiction, and inviolability, even though the acts complained of are official acts performed by the said diplomatic agent in the exercise of his functions."⁵

Reactions by:

FRG (30.9.1981)

"The Federal Republic of Germany regards the *reservations* . . . as incompatible with the object and purpose of the Convention. This declaration is not to be interpreted as preventing the entry into force of the Convention as between the Federal Republic of Germany and the Democratic Republic of Sudan."

The Sudanese statement appears to be a proper reservation in spite of the wording chosen by the Sudanese government that it will not grant immunity from jurisdiction of the receiving state even to official acts of such an agent. The FRG was the only part to react to this statement and although it considered the reservation to be incompatible it did not wish to prevent the convention from entering into force as between itself and the Sudan. The FRG does not specify if it will consider the "incompatible" reservation of the whole Sudanese accession null and void or if it assumes that the ordinary rules on objections will apply according to article 21 of the Vienna Convention. The latter alternative is probably the correct one.⁶

Article 11(1)

"In the absence of specific agreement as to the size of the mission the receiving state may require that the size of mission be kept within limits considered by it to be reasonable and normal, having regard to circumstances and conditions in the receiving State and to the needs of the particular mission."

Statements by:

Bulgaria (17.1.1968)

"In accordance with the principle of the equality of States, the People's Republic of Bulgaria considers that any difference of opinion regarding the size of a diplomatic mission should be settled by agreement between the sending State and the receiving State."

Byelorussia (14.5.1964)

identical with Bulgarian statement

Reactions by:

Australia (Byelorussia, Ukraine, USSR, Mongolia: 14.3.1968; GDR: 6.9.1973)

"... does not regard the *statements* . . . as modifying any rights and obligations under the paragraph."

(Democratic Yemen: 21.6.1978)

"... does not regard the *reservation* . . . as modifying any rights and obligations under the paragraph."

Democratic Yemen (24.11.1976)

ditto

GDR (2.2.1973)

ditto

Ukraine (12.6.1964)

ditto

USSR (25.3.1964)

ditto

Mongolia (5.1.1967)

ditto

Belgium (Byelorussia, Ukraine, USSR, Mongolia: 2.5.1968)

"... considers the *statement* ... to be incompatible with the letter and spirit of the Convention and does not consider it as modifying any rights or obligations under the paragraph."

Canada (Byelorussia, Ukraine, USSR: 26.5.1966; Bulgaria, Dem.Yem, GDR Mongolia: 16.3.1978)

"... does not regard the *statement* ... as modifying any rights or obligations under this paragraph."

Denmark (Byelorussia, Bulgaria, Mongolia, Ukraine, USSR: 2.10.1968)

identical with Canadian reaction

France (Byelorussia, Bulgaria, Mongolia, Ukraine, USSR: 31.12.1970)

ditto

FRG (Byelorussia, Ukraine, USSR: 11.11.1964; Mongolia: 10.5.1968; Bulgaria: 9.7.1968)

"... considers as incompatible with the letter and spirit of the Convention the *reservation* ..."

(GDR: 25.9.1974)

"... regards the *reservation* ... as incompatible with the letter and intent of the Convention."

(Dem. Yemen: 4.3.1977)

"... as regards the *reservation* ... as incompatible with the purpose and objective of the Convention."

Greece (Bulgaria, Byelorussia, Mongolia, Ukraine, USSR: 16.7.1970)

"... cannot accept the *reservation* ..."

Luxembourg (Byelorussia, Ukraine, USSR: 18.1.1965)

"... regrets that it cannot accept that *reservation* ... which tends to modify the effect of certain provisions of the Convention."

Malta (Byelorussia, Ukraine, USSR: 7.3.1967)

identical with Canadian reaction

Netherlands (Byelorussia, Bulgaria, GDR, Mongolia, Ukraine, USSR, Dem. Yemen: 7.9.1984)

"... does not accept the *declarations* ... The Kingdom of the Netherlands takes the view that this provision remains in force in relations between it and the said States in accordance with international customary law."

New Zealand (Bulgaria, Byelorussia, Mongolia, Ukraine, USSR: 23.9.1970)

identical with Canadian reaction

Tonga (Bulgaria, Byelorussia, Mongolia, Ukraine, USSR: 31.1.1973)

adopts the objections made by the UK

Tanzania (USSR: 22.6.1964)

"... rejects formally the *reservation* ..."

Thailand (Byelorussia, Bulgaria, GDR, Mongolia, Ukraine, USSR, Dem. Yemen: 23.1.1985)

"... does not regard *statements* as modifying any rights and obligations under that paragraph ..."

United Kingdom (Byelorussia, Ukraine, USSR: 1.9.1964; Mongolia: 7.6.1967; Bulgaria: 29.3.1968; GDR: 16.4.1973)

identical with the Canadian reaction

(Dem. Yemen: 4.2.1977)

"... do not regard the *reservation* ... as modifying any rights or obligations under that paragraph."

Article 11(1) prescribes that the receiving and sending states should in the first place agree to the size of the mission, but if such agreement is not reached the convention evidently gives the receiving state the right and liberty to fix unilaterally the size of the mission. The statement of the seven socialist states does not accept such a competence for the receiving state and requires that the question of the size of missions should always be based on common agreement. It seems as if certain confronted states were not sure about the nature of these statements designating them simply as "statements" although they simultaneously used the term "reservation" with regard to those parts of the statements which related to article 37(2).⁷ In more recent reactions to these identical statements a switch towards using the term "reservation" is to be noticed. Certain of the reacting states considered these statements to be clearly reservations and believed them even to be incompatible. Nearly all these states declared that the statements, whatever their designation, were not modifying the obligations under paragraph 1 of article 11. This could either mean that they were considered to be incompatible reservations and as such void, or that they were unacceptable interpretations.

B. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (New York 14.12.1973)

Article 1(1)(b)

"1. 'Internationally protected person' means

(a) –

(b) any representative or official of a State or any official or other agent of an international organization of an intergovernmental character who, at the time when and in the place where a crime against him, his official premises, his private accommodation or his means of transport is committed, is entitled pursuant to international law to special protection from any attack on his person, freedom of dignity, as well as members of his family forming part of his household;"

Statements by:

Iraq (28.2.1978)

"Subparagraph (b) of paragraph (1) of article 1 of the Convention shall cover the representatives of national liberation movements recognized by the League of Arab States or the Organization of African Unity."

Reactions by:

FRG (30.11.1979)

"The *statement* ... does not have any legal effects for the Federal Republic of Germany."

Israel (31.7.1980)

"... does not regard as valid the *reservation* ..."

United Kingdom (2.5.1979)

"... do not regard as valid the *reservation* ..."

Italy (30.8.1985)

"... does not consider as valid the *reservation* ..."

The convention speaks of representatives and officials of a *state* and thus obviously does not embrace the case of liberation movements. If this would have been the intention of the majority of the General Assembly adopting the convention, it would certainly have been reflected in a more precise formulation. It would seem that at least Israel and the United Kingdom considered the statement to amount to an incompatible reservation being null and void, although the compatibility criterion was not explicitly invoked. The other effect of incompatibility would have been that these states considered the reserving state not to be a party to the convention (at least as concerns themselves). A simple objection on the other hand would have the effect of excluding article 1(1)(b) from applying to the extent of the statement between the UK and Iraq and between Israel and Iraq.

It is reasonable to construe the expression "to the extent of the reservation" in article 21(3) of the Vienna Convention in this case restrictively and not consider the whole relevant provision as inoperative. Should the stipulative definition contained in article 1(1)(b) be completely inapplicable the whole convention may become ineffective in the relations between Iraq on one side and the UK and Israel on the other side. The objections will now only have the effect of leaving the question of the representatives of national liberation movements legally unsettled between the declarant and the objecting states. The FRG had chosen a more prudent formulation speaking of a "*statement*" instead of a "*reservation*". It is not certain if the FRG considered the Iraqi

statement to be an interpretative declaration. With respect to the legal position of the FRG, Israel and the UK it would not make any difference if the statement was considered a reservation or only an interpretative declaration. The Convention applies but the problem of the legal status of the representatives of national liberation movements under the Convention awaits its final solution. However the nature of the statement is relevant for the other confronted states. May the statement be opposed to them on the basis of the rule of tacit acceptance? If the statement presented in 1978 is a reservation the accession by Turkey in 1981 and Greece in 1984 without objections would imply acceptance. The inaction by Austria having acceded in 1977 and Sweden having ratified 1975 could be construed as tacit acceptance. If the statement is simply a unilateral interpretation the states mentioned above would not be bound by it.

C. Convention on the Punishment and Prevention of the Crime of Genocide
(New York 9.12.1948)

Article IV

"Persons committing genocide or any other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."

Statements by:

Philippines (7.7.1950)

"With the reference to article IV of the Convention, the Philippines Government cannot sanction any situation which would subject its Head of State, who is not a ruler, to conditions less favourable than those accorded other Heads of State, whether constitutionally responsible rulers or not.

The Philippine Government does not consider that article therefore as overriding the existing immunities from judicial processes guaranteed certain public officials by the Constitution of the Philippines."

Finland (18.12.1959)

"... Subject to the provision of article 47, paragraph 2, of the Constitution Act, 1919, concerning the impeachment of the President of the Republic of Finland."

Reactions by:

Australia (Philippines: 8.7.1949)

"... does not accept any of the *reservations*."

Brazil (Philippines: 15.4.1952)

"... objects to the *reservations* ... considers the *reservations* as incompatible with the object and purpose of the Convention ... The Brazilian Government reserves the right to draw any such legal consequences as it may deem fit from its *formal objection* to the above-mentioned *reservations*."

Norway (Philippines: 10.4.1952)

"... does not accept the *reservations* ..."

United Kingdom (Philippines:⁸ 30.1.1970)

"... does not accept the *reservations* ..."

No reactions

The statement of the Philippines contained other declarations and reservations to articles VI, VII and IX. The disapprovals of Australia, Brazil, Norway and the UK made no distinction between the different parts of the Philippine statement. The scope of the Philippine statement remains uncertain as it does not become clear if the Philippine head of state goes free from conviction

under the Convention.⁹ According to the principle of *bona fides* the confronted states should be able to rely on the coherence between a state's national legislation and international engagements. If this is not the case the state will have to say to what extent a treaty right or obligation is derogated from. It would have been preferable to assume the statement as concerns article IV to be an interpretative declaration. Choosing a formal reservation as a reaction has the consequences that the reserving states loose their possibility to invoke most parts of article IV against the Philippines. Only Brazil would retain the possibility of invoking this article, because it could consider the "reservation" invalid because incompatible. This would follow from the Vienna Convention regime. It must be remembered though that reservations as a concept was not yet crystallized at this time nor the rules adopted that would apply to them.¹⁰

The Finnish statement did not meet with any disapproval and cannot be constituted as a true derogation from the obligations under the Convention. Article IV speaks of "constitutionally responsible rulers". Now the Finnish President is only constitutionally responsible for certain major offences, that is he may only be convicted for high treason and treason. This means that he cannot be convicted for genocide because he is not responsible for participation in such acts according to the Finnish Constitution.¹¹

D. International Convention on the Elimination of All Forms of Racial Discrimination (New York 7.3.1966)

Article 4

"States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour of ethnic origin or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designated to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

(a) Shall declare punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law,

(c) Shall not permit public authorities or public institutions, national or local to promote or incite racial discrimination."

Statements by:

No reactions

Australia (30.9.1975)

"... declares that Australia is not at present in a position specifically to treat as offences

all the matters covered by article 4(a) of the Convention. Acts of the kind there mentioned are punishable only to the extent provided by the existing criminal law dealing with such matters as the maintenance of public order, public mischief, assault, riot, criminal libel, conspiracy and attempts.

It is the intention of the Australian Government, at the first suitable moment to seek from Parliament legislation specifically implementing the terms of article 4(a)."

Austria (9.5.1972)

"Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination provides that the measures specifically described in sub-paragraphs (a), (b) and (c) shall be undertaken with regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of the Convention. The Republic of Austria therefore considers that through such measures the right of freedom of opinion and expression and the right of freedom of peaceful assembly and association may not be jeopardized. These rights are laid down in articles 19 and 20 of the Universal Declaration of Human Rights; they are reaffirmed by the General Assembly of the United Nations when it adopted articles 19 and 21 of the International Covenant on Civil and Political Rights and are referred to in article 5(d)(viii) and (ix) of the present Convention."

Bahamas (5.8.1975)

"... wishes to state its *understanding* of article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination. It *interprets* article 4 as requiring a party to the Convention to adopt further legislative measures in the fields covered by sub-paragraphs (a), (b) and (c) of that article only in so far as it may consider with due regard to the principles embodied in the Universal Declaration set out in article 5 of the Convention (in particular to freedom of opinion and expression and the right of freedom of peaceful assembly and association) that some legislative addition to, or variation of existing law and practice in these fields is necessary for the attainment of the ends specified in article 4 ..."

Barbados (11.6.1979)

"The Constitution of Barbados entrenches and guarantees to every person in Barbados the fundamental rights and freedoms of the individual irrespective of his race or place of

origin. The Constitution prescribes judicial processes to be covered in the event of the violation of any of these rights whether by the State or by a private individual. Accession to the Convention does not imply the acceptance of obligations going beyond the constitutional limits nor the acceptance of any obligations to introduce judicial processes beyond those provided in the Constitution.

The Government of Barbados *interprets* article 4 of the said Convention as requiring a Party to the Convention to enact measures in the fields covered by sub-paragraphs (a), (b) and (c) of that article only where it is considered that the need arises to enact such legislation."

Belgium (7.8.1975)

Part 2 is similar to the Austrian statement.

Parts 1 and 3 have the following wording:

"In order to meet the requirements of article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination, the Kingdom of Belgium will take to adapt its legislation to the obligations it has assumed in *becoming* a party to the said Convention.

The Kingdom of Belgium also wishes to emphasize the importance which it attaches to respect for the rights set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms, especially in articles 10 and 11 dealing respectively with freedom of opinion and expression and freedom of peaceful assembly and association."

Fiji (11.1.1973)

Identical with the statement of Barbados.

France (28.7.1971)

"... *interprets* the reference made therein to the principles of the Universal Declaration of Human Rights and to the rights set forth in article 5 of the Convention as releasing the State Parties from the obligation to enact anti-discrimination legislation which is incompatible with the freedoms of opinion and expression and of peaceful assembly and association guaranteed by those texts."

Italy (6.1.1976)

Italy declared that sub-paragraphs (a) and (b) are to be "*interpreted*" with due regard to the principles embodied in those instruments that were mentioned in the Australian statement.

The Statement reads further:

"In fact the Italian Government, in conformity

with the obligations resulting from articles 55(c) and 56 of the Charter of the United Nations, remains faithful to the principle laid down in article 29(2) of the Universal Declaration, which provides that, in exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

Malta (27.5.1971)

"It *interprets* article 4 as requiring party to the Convention to adopt further measures in the fields covered by sub-paragraphs (a), (b) and (c) of that article should it consider, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights set forth in article 5 of the Convention, that the need arises to enact 'ad hoc' legislation, in addition to or variation of existing law and practice to bring to an end any act of racial discrimination."

Nepal (30.1.1971)

identical with the statement of the Bahamas

Papua New Guinea (27.1.1982)

identical with the statement of the Bahamas and the first part of the statement of Barbados

Tonga (16.2.1972)

identical with the statement of the Bahamas

United Kingdom (30.1.1970)

See statement of the Bahamas. The British statement made on signing and later confirmed on ratification, became a model for states like the Bahamas that had formerly been dependent territories to the United Kingdom.

Most of these statements stress that the provisions under article 4 are to be applied having regard to the Universal Declaration of Human Rights. This is actually provided by article 4 itself. To this extent the statements have only an affirmative character. Reference has also been made to other treaties, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms. It was further stressed that there was no conflict arising between article 4 and the freedoms of opinion and expression as well as the freedoms of peaceful assembly and association guaranteed by the Convention itself in article 5 or in other international agreements. Most declaring states indicated that their statements were an interpretation of article 4. The French

government thought it also advisable to emphasize in a subsequent note that its statement did not purport to limit the obligations under the convention but only to record its interpretation of that article.¹² Most declaring states thought the formulation of article 4 to be so broad that it permitted such interpretations. If by any chance article 4 would be construed to be in conflict with the European Convention this will become a problem of application of two formally valid agreements which has to be settled according to the principles which regulate this situation. None of the statements were reacted upon. Thus we have no picture of how the confronted states looked at these statements. Probably there were no reactions because they could not see their immediate interests being affected by them. It would seem reasonable to assume that they shared the view that the statements were interpretative declarations.

E. International Covenant on Economic, Social and Cultural Rights (New York 16.12.1966)

Article 1

“All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

Statement by:

India (10.4.1979)¹³

“... declares that the words ‘the right of self-determination’ appearing in (this article) apply only to the peoples under foreign domination and that these words do not apply to sovereign independent States or to a section of a people or nation – which is the essence of national integrity.”

Reactions by:

France (4.11.1980)

“... takes *objection* to the *reservation* ... , as this *reservation* attaches conditions not provided for by the Charter of the United Nations to the exercise of the right of self-determination. The present *declaration* will not be deemed to be an obstacle to the entry into force of the Covenant between the French Republic and the Republic of India.”

FRG (15.8.1980)

“... strongly *objects* ... to the *declaration*. The right of self-determination as enshrined in the Charter of the United Nations and as embodied in the Covenants applies to all peoples and not only to those under foreign domination. All peoples therefore have the inalienable right freely to determine their political status and freely to pursue their economic, social and cultural development. The Federal Government cannot consider as valid any *interpretation* of the right of self-determination which is contrary to the clear language of the provision in question. It moreover considers that any limitation of their applicability to all nations is *incompatible with the object and purpose* of the Covenants.”

Netherlands (12.11.1981)

"... *objects to the declaration* . . . , since the right of self-determination as embodied in the Covenants is conferred upon all peoples. This follows not only from the very language of article 1 common to the two Covenants but as well as from the most authoritative statement of the law concerned, i.e., the Declaration of Principles of International Law concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations. Any attempt to limit the scope of this right or to attach conditions not provided for in the relevant instruments would undermine the concept of self-determination itself and would thereby seriously weaken its universally acceptable character."

The concept of self-determination continues to be a vague one as opinions diverge as to its actual scope. The Indian statement is as equally unclear in its wording. This statement is naturally politically motivated as the Indian state comprises many ethnic groups which could perhaps feel a temptation to invoke the principle of self-determination. India wanted to make it clear that the principle of self-determination as a legal one would only apply to cases of "foreign domination" meaning primarily colonial domination.¹⁴ Still the term "foreign domination" remains an equally vague term, which may be interpreted in different ways. The statement by India is reasonably construed as an interpretation of articles 1 of the two Covenants in spite of the fact that France called it a "reservation". The governments of the FRG and the Netherlands formulated their disapproval in very rigid language and the FRG even condemned the "declaration" as being incompatible with the object and purpose of the covenants. The harshness of the condemnation and the reference to the incompatibility criterion ought not to influence the decision as to the nature of the statement.

Article 8

"1 The States Parties to the Present Covenant undertake to ensure:

(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or to join international trade-union organizations;

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of the national security or public order or for the protection of the rights and freedoms of others;

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

3. Nothing in this article shall authorize States Parties to the International Labour Organization Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention."

No reactions

Statements by:

India (10.4.1979)

"... shall be applied as to be in conformity with the provisions of article 19 of the Constitution of India."

Japan (21.6.1979)

"'Members — of the police' referred to in paragraph 2 of article 8 ... be *interpreted* to include fire service personnel of Japan."

Mexico (23.3.1981)

"... *understanding* that article 8 of the Covenant shall be applied in the Mexican Republic under the conditions and in conformity with the procedure established in the applicable provisions of the Political Constitution of the United Mexican States and the relevant implementing legislation."

Netherlands (11.12.1978)

'*Reservation*' with respect to article 8(1)(d)¹⁵

"... does not accept this provision in the case of the Netherlands Antilles with regard to the latter's central and local government bodies."

Explanation:

"... clarify that although it is not certain whether the reservation ... is necessary, (it) has preferred the form of a *reservation* to that of a declaration. In this way the Kingdom of the Netherlands wishes to ensure that the relevant obligation under the Covenant does not apply to the Kingdom as far as the Netherlands Antilles is concerned."

New Zealand (28.12.1978)

"... reserves the right not to apply article 8 to the extent that existing legislative measures, enacted to ensure effective trade union representation and encourage orderly industrial relations, may not be fully compatible with that article."

Norway (13.9.1979)

Subject to *reservations* to article 8, paragraph 1(d)

"to the effect that the current Norwegian practice of referring labour conflicts to the State Wages Board (a permanent tripartite arbitral commission in matters of wages) by Act of Parliament for the particular conflict, shall not be considered incompatible with the right to strike, the right being fully recognized in Norway."¹⁶

Trinidad and Tobago (8.12.1978)

In respect of article 8(1)(d) and 8(2)

"... reserves the right to impose lawful and or reasonable restrictions on the exercise of the aforementioned rights by personnel engaged in essential services under the Industrial Relations Act or under any Statute replacing which same has been passed in accordance with the provisions of the Trinidad and Tobago Constitution."

United Kingdom (20.5.1976)

"... reserve the right not to apply subparagraph 1(b) of article 8 in Hong Kong."

Many of the states presenting statements to article 8 referred to their constitutional and other internal regulations. This possibility is envisaged by provisions 8(1)(a), (c) and (d) as well as 8(2). The statements would appear to have a clarifying character provided that the law-based restrictions have the purpose of guaranteeing public order. Here again it must be said to be preferable that all statements indicate the actual state of national legislation in the matter.¹⁷

The Netherlands statement discussed earlier is of particular interest. Though the Netherlands government was not sure of the need to formulate a reservation it decided to do so instead of presenting a simple declaration, in order to make its view prevail in case it did not turn out to be the correct interpretation. A look at the wording in article 8(2), which provides a possibility to impose "lawful restrictions" on these rights for "members of the administration of the State," proves that the Netherlands statement referring to officials of central and local government bodies is of a clarifying kind and hardly to be construed as a derogation.¹⁸

Even Norway termed her statement a "reservation" although it would in

fact qualify for an interpretative declaration. In many of the ratifying states the right to strike may be limited by a certain obligation to refer disputes as to wages and labour conditions to mediating and arbitrating bodies under certain conditions.¹⁹

F. International Covenant on Civil and Political Rights (New York 16.12.1966)

Article 14(3)(d)

"In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees in full equality:

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it:"

Statements by:

Reactions by:

Austria (10.9.1978)

"(a) paragraph 3, sub-paragraph (d) is not in conflict with legal regulations which stipulate that an accused person who disturbs the orderly conduct of the trial or whose presence would impede the trial or whose presence would impede the questioning of another accused person, of a witness or of an expert can be excluded from participation in the trial;

FRG (17.12.1973)

"2. Article 14(3)(d) of the Covenant shall be applied in such manner that it is for the court to decide whether an accused person held in custody has to appear in person at the hearing before the court of review (Revisionsgericht)."

Netherlands (11.12.1978)

"The Kingdom of the Netherlands reserves the statutory option of removing a person charged with a criminal offence from the courtroom in the interests of the proper conduct of the proceedings."

Italy (15.9.1978)

"The provisions of article 14, paragraph 3(d), are deemed to be compatible with existing Italian provisions governing trial of the accused in his presence and determining the cases in which the accused may present his own defence and those in which legal assistance is required."

Venezuela (10.5.1978)

"Article 60, paragraph 5, of the Constitution of the Republic of Venezuela establishes that: 'No person shall be convicted in a criminal trial unless he has first been personally notified of the charges and heard in the manner prescribed by law. Persons accused of an offence against the *res publica* may be tried *in absentia*, with the guarantees and in the manner prescribed by law.'."

Venezuela is making this *reservation* because article 14, paragraph 3(d), of the Covenant makes no provision for persons accused of an offence against the *res publica* to be tried *in absentia*."

Australia (13.8.1980)

"Australia *interprets* paragraphs 3(d) of article 14 as consistent with the operation of schemes of legal assistance which the person assisted is required to make a contribution towards the cost of the defence related to the capacity to pay and determined according to law, or in which assistance is granted in respect of other than indictable offences only after having regard to all relevant matters."²⁰

Barbados (5.1.1973)

"The Government of Barbados states that it reserves the right not to apply in full the guarantee of free legal assistance in accordance with paragraph 3(d) of Article 14 of the Covenant, since, while accepting the principles contained in the same paragraph, the problems of implementation are such that full application cannot be guaranteed at present."

Gambia (22.3.1979)

"For financial reasons free legal assistance for accused persons is limited in our constitution to persons charged with capital offences only. The Government of Gambia therefore wishes to enter a *reservation* in respect to article 14(3)(d) of the Covenant in question."

Guyana (15.2.1977)

"While the Government of the Republic of Guyana accept the principle of Legal Aid in all appropriate criminal proceedings, is working towards that end and at present apply it in certain defined cases, the problems of implementation of a comprehensive Legal Aid Scheme are such that full application cannot be guaranteed at this time."

United Kingdom
(on signing 16.9.1968)

"(a) In relation to Article 14 of the Covenant,

they must *reserve* the right not to apply, or not to apply in full, the guarantee of free legal assistance contained in subparagraph (d) of paragraph 3 in so far as the shortage of legal practitioners and other considerations render the application of this guarantee in British Honduras, Fiji and St. Helena impossible;"

(on ratifying 20.5.1976)

"The Government of the United Kingdom *reserve* the right not to apply or not to apply in full the guarantee of free legal assistance in subparagraph (d) of paragraph 3 of article 14 in so far as the shortage of legal practitioners renders the applications of this guarantee impossible in the British Virgin Islands, the Cayman Islands, the Falkland Islands, the Gilbert Islands, the Pitcairn Islands Group, St. Helena and Dependencies and Tuvalu."

Finland (19.8.1975)²¹

Reservations

"5. With respect to article 14, paragraph 3(d), of the Covenant, Finland *declares* that the contents of this paragraph do not correspond to the present legislation in Finland inasmuch as it is a question of the defendant's absolute right to have legal assistance already at the stage of preliminary investigations;"

France (4.11.1980)²²

"(3) The Government of the Republic enters a *reservation* concerning articles 9 and 14 to the effect that these articles cannot impede enforcement of the rules pertaining to the disciplinary regime in the armies."

Luxembourg (18.8.1983)

"The Government of Luxembourg further *declares* that article 14, paragraph 3, shall not apply to persons who, under Luxembourg law, are remanded directly to a higher court or brought to the Assize Court."

Article 14(3)(d) establishes three major rights: the right to be tried in presence, the right to legal assistance and the right to have that assistance free under certain conditions. All these three parts have become the object of statements. In many cases the declaring state has not intended to give its statement any specific label. The Italian statement does not hold any special interest as it simply declares that the provision is consistent with Italian law. The statements concerning free legal assistance have mostly been designated as reservations although it remains a question of interpretation to what extent legal assistance should be free. Only Australia termed its statement an "interpretation". The provision creates also some doubts as to the question of whether the right to be tried in presence concerns all instances. Apparently any statement which concerns the right to be present in the court of higher

instance would be interpretative in character. Similarly a statement limiting the right of presence in case of disorderly conduct would also be closer to an interpretative declaration than a reservation.²³

G. Convention Relating to the Status of Refugees (Geneva, 28.7.1951)

Article 17

WAGE-EARNING EMPLOYMENT

1. The Contracting State shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.

2. In any case, restrictive measures imposed on aliens or the employment of aliens for the protection of the national labour market shall not be applied to a refugee who was already exempt from them at the date of entry into force of this Convention for the Contracting State concerned, or who fulfills one of the following conditions:

- (a) He has completed three years' residence in the country
- (b) He has a spouse possessing the nationality of the country of residence. A refugee may not invoke the benefit of the provision if he has abandoned his spouse.
- (c) He has one or more children possessing the nationality of the country of residence.

3. The Contracting States shall give sympathetic considerations to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals, and in particular of those refugees who have entered their territory pursuant to programmes of labour recruitment or under immigration schemes.

Statements by:

Reactions by:

Angola (23.6.1981)

“(a) Paragraph 1 of this article shall not be *interpreted* to mean that refugees must enjoy the same privileges as may be accorded to nationals of countries with which the People's Republic of Angola has signed special co-operation agreements.

(b) Paragraph 2 of this article shall be construed as a *recommendation* and not as an obligation.”

Brazil (16.11.1960)

general statement:

“Refugees will be granted the same treatment accorded to nationals of foreign countries in general, with the exception of the preferential treatment extended to nationals of Portugal through the Friendship and Consultation Treaty of 1953 and Article 199 of the Brazilian Constitutional Amendment No. 1, 1969.”

Portugal (13.7.1976)

general statement:

"In all cases in which this Convention confers upon the refugees the most favoured person status granted to nationals of a foreign country, this clause will not be *interpreted* in such a way to mean the status granted by Portugal to the nationals of Brazil."

Spain (14.8.1978)

general statement:

"The expression 'the most favourable treatment' shall, in all articles in which it is used, be *interpreted* as not including rights, which, by law or by treaty, are granted to nationals of Portugal, Andorra, the Philippines or the Latin American countries or to nationals of countries with which international agreements of a regional nature are concluded."

Denmark (25.3.1968)

"The obligation in article 17, paragraph 1, to accord to refugees lawfully staying in Denmark the most favourable treatment to nationals of a foreign country as regards the right to engage in wage-earning employment *shall not be construed* to mean that refugees shall be entitled to privileges which in this respect are accorded to nationals of Finland, Iceland, Norway and Sweden."

Finland (10.10.1968)

identical with Denmark's statement

Norway (23.3.1953)

ditto

Sweden (26.10.1954)

ditto

Belgium (22.7.1953)

"In all cases where the Convention grants to refugees the most favourable treatment accorded to nationals of a foreign country, this provision shall not be *interpreted* by the Belgian Government as necessarily involving the regime accorded to nationals of countries with which Belgium has concluded regional customs, economic or political agreements."

Netherlands (3.5.1956)

"... subject to the *reservation* that in all cases where this Convention grants to refugees the most favourable treatment accorded to nationals of a foreign country this provision shall not be *interpreted* as involving the regime accord-

ed to nationals of countries with which the Netherlands has concluded regional customs, economic or political agreements."

Luxembourg

(on signing 28.7.1951)

identical with the Netherlands's statement

Uganda (27.9.1976)

"The obligation specified in article 17 to accord to refugees lawfully staying in the country in the same circumstances shall not be construed as extending to refugees the benefit of preferential treatment granted to nationals of the states who enjoy special privileges on account of existing or future treaties between Uganda and those countries, particularly states of the East African Community and the Organization of African Unity, in accordance with the provisions which govern such charters in this respect."

Guatemala (22.9.1983)

Declaration:

"The expression 'treatment as favourable as possible' in all articles of the Convention and of the Protocol in which the expression is used should be *interpreted* as not including rights which, under law or treaty, the Republic of Guatemala has accorded or is according to nationals of the Central American countries with which it has concluded or is entering into agreements of a regional nature."

Reservation:

"The Republic of Guatemala accedes to the Convention relating to the Status of Refugees and its Protocol, with the *reservation* that it will not apply provisions of those instruments in respect of which the Convention allows reservations if those provisions contravene constitutional precepts in Guatemala or norms of public order under domestic law."

Belgium (5.11.1984)

"... considers that it is impossible for the other States Parties to determine the scope of a *reservation* which is expressed in such broad terms and which refers for the most part to domestic law, and that the *reservation* is thus not acceptable. It therefore voices an *objection* to the said reservation."

France (23.20.1984)

identical with Belgian reaction

Luxembourg (15.11.1984)

"... considers that the *reservation* made by the Republic of Guatemala concerning the Convention relating to the Status of Refugees of 28 July 1951 and the Protocol ... does not affect the obligations of Guatemala deriving from those instruments."

FRG (5.12.1984)

"The Federal Government views [the reservation made by Guatemala] as being worded in such general terms that its application could conceivably nullify the provisions of the Convention and the Protocol. Consequently this *reservation* cannot be accepted."

Italy (26.11.1984)

"... considers the [reservation made by Guatemala] to be unacceptable since the very general terms in which it is couched and the fact that it refers for the most part to domestic law and leaves it to the Guatemalan Government to

decide whether to apply numerous aspects of the Convention make it impossible for other States Parties to determine the scope of the *reservation*."

Netherlands (11.12.1984)

"... is of the opinion that a [the reservation by Guatemala] phrased in such general terms and referring to the domestic law only is undesirable, since its scope is not entirely clear."

Austria (1.11.1954)

"(a) Subject to the *reservation* that the Republic of Austria regards the provision of article 17, paragraphs 1 and 2 (excepting, however, the phrase 'who was already exempt from them at the date of entry into force of this Convention for the Contracting State concerned, or ...' in the latter paragraph) not as a binding obligation, but merely as a *recommendation*."

Ethiopia (10.11.1969)

"The provisions of ... 17(2), ... are recognized only as *recommendations* and not as binding obligations."

Iran (28.7.1976)

"... considers the stipulations contained in articles 17, ... as being *recommendations only*."

Italy (15.11.1954)

"... declares that the provisions of articles 17 and 18 are recognized by it as *recommendations only*."

Sierra Leone (22.5.1981)

"... wishes to state with regard to article 17(2) that Sierra Leone does not consider itself bound to grant refugees the rights stipulated therein. Further, with regard to article 17 as a whole, the Government of Sierra Leone wishes to state that it considers the article to be a *recommendation only* and not a binding obligation."

Botswana (6.1.1969)

"Subject to the *reservations* of articles ..., 17, ..."

Chile (28.1.1972)

"(2) With the *reservation* that the period specified in article 17, paragraph 2(a) shall, in the case of Chile, be extended from three to ten years;

(3) With the *reservation* that article 17, paragraph 2(c) shall apply only if the refugee is the widow or widower of a Chilean spouse;"

United Kingdom (11.3.1954)

"... accept paragraph 2 of article 17 with the substitution of 'four years' for 'three years' in sub-paragraph (a) and with the omission of sub-paragraph (c)."

Cyprus (16.5.1963)

identical with UK statement

Gambia (7.9.1966)

ditto

Jamaica (30.7.1964)

ditto

France (5.4.1960)

"(b) Article 17 in no way prevents the application of the laws and regulations establishing the proportion of alien workers that employers are authorized to employ in France or affects the obligations of such employers in connection with the employment of alien workers."

Madagascar (18.12.1967)

"The provisions of article 17 cannot be *interpreted* as preventing the application of the laws and regulations establishing the proportion of alien workers that the employers are authorized to employ in Madagascar or affecting the obligations of such employers in connexion with the employment of alien workers."

Greece (5.4.1960)

"As far as wage-earning employment under article 17 is concerned, the Hellenic Government shall not accord to the refugees less rights than those accorded generally to nationals of foreign countries."

Ireland (29.11.1956)

"... do not undertake to grant to refugees rights of wage-earning employment more favourable than those granted to aliens generally."

Liechtenstein (8.3.1957)

"With respect to the right to engage in wage-earning employment, refugees are treated in law on the same footing as aliens in general, on the understanding, however, that the competent authorities shall make every effort insofar as possible, to apply to them the provisions of this article."

Switzerland (21.1.1955)

(withdrawn 18.2.1963)

identical with Liechtenstein's statement

Mozambique (16.12.1983)

"The Government of Mozambique will *interpret* [this provision] to the effect that it is not required to grant privileges from obligation to obtain a work permit."

Zambia (24.9.1969)

"... does not consider itself bound to grant to a refugee who fulfils any one of the conditions set out in sub-paragraphs (a) to (c) automatic exemption from the obligation to obtain a work permit.

Further with regard to article 17 as a whole, Zambia does not wish to undertake to grant to refugees rights of wage-earning employment more favourable than those granted to aliens generally."

Zimbabwe (25.8.1981)

identical with Zambia's statement

Malta (17.6.1971)

"... article ... 17 ... shall apply to Malta compatibly with its own special problems, its peculiar position and characteristics."

Statements to article 17 of the 1951 Refugees Convention abound and a considerable number of them mention that the expression "most favourable treatment" is not to be read as an absolute rule. Concessions that have been made mutually between states belonging to a certain regime of regional or cultural co-operation, like the Nordic countries, the Benelux group, the African states and the Hispanic states, have been declared not to extend to refugees. The wording of these statements proves that the declaring states believed their statements only to clarify the meaning of article 17 although it would appear that these statements were exemptions from a general obligation of most favoured nations treatment to refugees. Frequently consenting states have denied the obligatory force of the norms under article 17 indicating that they considered them only to be recommendations. As the wording of the article uses absolute terms such as "shall accord" and "shall not be applied", article 17(1) and (2) must be held to stand for clear duties. That this is the correct reading of paragraphs 1 and 2 is further strengthened by the wording of paragraph 3 which states that the contracting states "shall give sympathetic consideration" of farther going rights, which is therefore only recommendatory in nature. These reservations are of the kind which alter the force of the norms.²⁴

The Guatemalan statement is the only one of the present examples which has been disapproved. The reacting states have expressed their irritation over the formulations used which creates doubts about the nature and scope of the

statement. The statement refers in general terms to the Guatemalan constitution without specifying if and to what extent it makes the application of the Convention impossible. It is not possible to say if it has any bearing on article 17 of the Convention. Confronted states will not be able to make formal objections because they do not know if and how the statement means a derogation from the obligations of the Refugees Convention. The reactions by six states stems from the desire to reserve one's position as a precautionary measure. They could be construed as potential objections.

H. Convention on the International Maritime Organization (Geneva 6.3.1948)

Article 1(b)

To encourage the removal of discriminatory action and unnecessary restrictions by Governments affecting shipping engaged in international trade so as to promote the availability of shipping services to the commerce of the world without discrimination; assistance and encouragement given by a Government for the development of its national shipping and for the purposes of security does not in itself constitute discrimination provided that such assistance and encouragement is not based on measures designed to restrict freedom of shipping of all flags to take part in international trade;

Statements by:

India (6.1.1959)

"In accepting the Convention on the IMCO the Government of India *declare* that any measures which it adopts or may have adopted for giving encouragement and assistance to its national shipping and shipping industries (such, for instance, as loan-financing of national shipping companies at reasonable or even concessional rates of interest, or the allocation of Government-owned or Government-controlled cargoes to national ships or the reservation of the coastal trade for national shipping) and such other measures as the Government of India may adopt, the sole object of which is to promote the development of its own national shipping, are consistent with the purposes of the IMCO as defined in article 1(b) of the Convention."

Accordingly, any recommendations relating to this subject that may be adopted by the Organization will be subject to re-examination by the Government of India.

The Government of India further expressly state that its acceptance of the above-mentioned Convention neither has nor shall have the effect of altering or modifying in any way the law on the subject in force in the territories of the Republic of India."

Reactions by:

UNGA VIth Committee, 614th meeting

confirmed the statement to be a *declaration of policy* and *not a reservation*

IMCO Council, resolution of 1.3.1960

the Indian statement was not to have any legal effect on the interpretation of the IMCO Convention

Cambodia (3.1.1961)

identical statement as India

additional statement (31.1.1962):

"... agrees that the first part of the declaration ... is of a *political nature*. It therefore has no legal effect regarding the interpretation of the Convention.

The statements contained in the third paragraph of the declaration, on the other hand, constitute a *reservation* to the Convention by the Royal Government of Cambodia."

Indonesia (18.1.1961)

identical with India's statement

additional statements (30.10.1961, 11.1.1962 and 28.3.1962):

"... does not constitute a reservation but is an *interpretation* to article 1(b) of the said Convention and should be understood as such.

In view of the above fact, the Government of Indonesia cannot accept the assumption that this declaration has no legal effect with regard to the interpretation of the Convention."

United Kingdom (14.9.1961), Norway (30.11.1961) Greece (14.3.1962)

assumed the statement to be a *declaration of policy* and *not a reservation* and that it did not have any legal effect regarding the interpretation of the convention, in accordance with the resolution of the IMCO Council

complementary reactions:

United Kingdom (3.7.1962)

"... do not share the view of the Cambodian Government that the third paragraph of the declarations constitutes a reservation, but they do not wish on that account, to raise formal objections to the terms of Cambodia's acceptance of the Convention."

France (23.7.1962)

"It considers that, for reasons of principle as well as of fact, it cannot accept the terms of the *declaration* in question, the third paragraph of which is, moreover, described by the Permanent Representative of Cambodia as constituting a reservation."

United Kingdom (14.9.1961), Norway Greece (14.3.1962)

assumed the statement to be a *declaration of policy* and *not a reservation* and that it did not have any legal effect regarding the interpretation of the Convention, in accordance with the resolution of the IMCO Council

Complementary reactions:

United Kingdom (18.4.1962)

"... do not wish to raise formal objection to

the terms of Indonesia's acceptance, but they desire to place on record that they do not thereby concede that they will necessarily regard any measures of assistance and encouragement which the Government of Indonesia may give to its national shipping as consistent with the Convention."

France (23.7.1962)

"... It considers that for reasons of principle as well as of fact, it cannot accept the terms of the *declaration* in question."

United States (5.9.1962)

"... will *not* raise *objection* to the terms of Indonesia's acceptance of the Convention on the Inter-Governmental Maritime Consultative Organization. However, it does not thereby concede that it will necessarily regard every measure of assistance and encouragement which the Government of Indonesia may give to its national shipping as consistent with the Convention."

Malaysia (17.6.1971)

identical with India's statement

no reactions

clarification (3.6.1971):

"... is a *declaration of policy* of the Government of Malaysia, and does not constitute a reservation by the Government of Malaysia to the Convention as stated in the instrument of acceptance."

Sri Lanka (6.4.1972)

no reactions

identical with India's statement

clarification (6.4.1972):

"... The declaration set forth in the instrument of acceptance does not constitute a reservation, but is an *interpretation* of article 1(b) of the Convention and should be understood as such."

Cuba (6.5.1966)

In accepting the Convention on the Inter-Governmental Maritime Consultative Organization, the Revolutionary Government of the Republic of Cuba *declares* that its current legislation, which is duly adapted to the encouragement and development of its Merchant Marine, *is consistent with the general purposes* of the Inter-Governmental Maritime Consultative Organization as defined in article 1(b) of the Convention. Accordingly, any recommendations relating to this subject that may be adopted by the Organization will be re-examined by the Government of Cuba in the light of the national policy in this regard."

Ecuador (12.7.1956)

"The Government of Ecuador *declares* that the protectionist measures adopted in the interests of its National Merchant Marine and the Merchant Fleet of Greater Colombia (Flota Mercante Grancolombiana), the vessels belonging to which are regarded as Ecuadorian by reason of the participation of the Government of Ecuador in the said Fleet, are measures the sole object of which is to promote the development of the National Merchant Marine and of the Merchant Fleet of Greater Colombia and *are consistent with the purposes* of the Inter-Governmental Maritime Organization, as defined in article 1(b) of the Convention. Accordingly, any recommendations relating to this subject that may be adopted by the Organization will be re-examined by the Government of Ecuador."

Iraq (28.8.1973)

"The Republic of Iraq hereby *declares* that article 1(b) of the Convention *is not in conflict with* the measures taken by it to encourage and assist national shipping companies, such as the granting of financial loans; the assignment of cargo vessels flying its flag to carry specific goods and the assignment of coastal shipping in the interest of national commercial vessels, or any other measures aimed at the development and growth of the national fleet or national shipping."

Mexico (21.9.1954)

"The Government of the United States of Mexico, in accepting the Convention on the Inter-Governmental Maritime Consultative Organization, on the *understanding* that nothing in the said Convention is intended to change national legislation relating to restrictive business practices, expressly states that its acceptance of the above-mentioned international instrument neither has nor shall have the effect of altering or modifying in any way the application of the laws against monopolies in the territory of the Republic of Mexico."

United States (17.8.1950)

"It being *understood* that nothing in the Convention on the Inter-Governmental Maritime Consultative Organization is intended to alter domestic legislation with respect to restrictive business practices, it is hereby *declared* that ratification of that Convention by the Government of the United States of America does not and will not have the effect of altering or modifying in any way

the application of the antitrust statutes of the United States of America.”

Denmark (3.6.1959)

“The Government of Denmark supports the work programme adopted during the first Assembly of the Organization in January 1959 and *holds the view* that it is in the field of technical and nautical matters that the Organization can make its contribution towards the development of shipping and seaborne trade throughout the world.

If the Organization were to extend its activities to matters of a purely commercial or economic nature, a situation might arise where the Government of Denmark would have to consider resorting to the provisions regarding withdrawal contained in article 59 of the Convention.”

Finland (21.4.1959)

identical with Denmark’s statement

Greece (31.12.1958)

ditto

Iceland (8.11.1960)

ditto

Morocco (30.7.1962)

ditto

Norway (29.12.1958)

ditto

Poland (16.3.1960)

similar with Denmark’s statement

Spain (23.1.1962)

ditto

Sweden (27.4.1959)

identical with Denmark’s statement

Yugoslavia (12.2.1960)

ditto

The case of the five identical statements by India, Cambodia, Indonesia, Malaysia and Sri Lanka shows that one was not ready to accept these statements as proper reservations. Those states which reacted to these statements considered them to be declarations of policy in accordance with the outcome of the deliberations in the UN General Assembly and the IMCO Council on the Indian statement. Only Cambodia and Indonesia, were not ready to accept completely the views of the IMCO Council and the confronted member states. Cambodia did not abandon its view that the third part of its

statement was a reservation. Indonesia agreed that all parts of her statement were of an interpretative character, but she was not ready to accept that her interpretation had no legal effect. As the IMCO Council must be recognized to have the competence to interpret authoritatively the Constitution of the IMCO, its decision on the Indian statement, which was accepted by India, also bound Cambodia and Indonesia. Cambodia may not invoke any valid derogation from the provisions of the IMCO Constitution on the grounds of inconsistency with its national legislation. Indonesia may not bindingly oppose its interpretation of the IMCO Constitution vis à vis any of the member states of the organization. Her statement may only have some evidential value in the case where a dispute arises as to the correct interpretation of her national legislation in the matter. Malaysia and Sri Lanka must be considered to have acquiesced in the official understanding of the statements as being unilateral interpretations not binding on the organization or its members.²⁵

The other group of statements referring to national legislation or protectionist measures do actually resemble the first category. It is not easy to decide if statements like the one by Mexico simply propagate legitimate assistance and encouragement to national shipping or if they reserve the right to restrictive practices which may be considered as unfair. Most of these statements clarify that they are consistent with the purposes of the IMCO Constitution. They are presumed to be simple declarations of interpretation or policy. The third group consists of statements which declare that the IMCO should only treat technical and nautical matters but not purely commercial and economic questions. Here the policy character is even more evident. None of the statements belonging to these groups has been disapproved which strengthens the presumption that they are not reservations proper.

I. Convention on the Political Rights of Women (New York 31.3.1953)

Article III

Women shall be entitled to hold public office and to exercise all public functions, established by national law, on equal terms with men, without any discrimination.

Statements by:

Reactions by:

Australia (10.12.1974)

"... subject to the *reservation* that article III of the Convention shall have no application as regards recruitment to and conditions of service in the Defence Forces."

Belgium (20.5.1964)

"1. The Constitution reserves the exercise of royal powers to men. As regards the exercise of the functions of regency, article III of the Convention shall not prevent the application of the constitutional rules as interpreted by the Belgian State."

Denmark (7.7.1954)

"Subject to the *reservation* with respect to article III of the Convention, in so far as it

relates to the right of women to hold military appointments or to act as heads of recruitment services or to serve on recruitment boards."

Finland (6.10.1958)

"A decree may be issued to the effect that only men or women can be appointed to certain functions, which because of their nature, can be properly discharged either only by men or by women."

Guatemala (7.10.1959)

"... shall apply only to female citizens of Guatemala in accordance with the provisions of article 16, paragraph 2 of the Constitution of the Republic."

India (1.11.1961)

"... shall have no application as regards recruitment to, and conditions of service in any of the Armed Forces of India or the Forces charged with the maintenance of public order in India."

Ireland (14.11.1968)

"Article III is accepted subject to *reservation* in so far as it relates to:

- (a) the employment of married women in certain positions in the public service;
- (b) the unequal remuneration of women in certain positions in the public service;

and subject to the following *declarations*:

- (1) that the exclusion of women from positions of employment for which by objective standards or for physical reasons they are not suitable is not regarded as discriminatory;
- (2) that the fact that jury service is not at present obligatory for women is not regarded as discriminatory."

Italy (6.3.1968)

"... declares that it reserves its rights to apply the provisions of Art. III as far as service in the armed forces and in special armed corps is concerned within the limits established by national legislation."

Lesotho (4.11.1974)

"... subject to the *reservation*, pending notification of withdrawal in any case, so far as it relates to: Matters regulated by Basotho Law and Custom."

Yugoslavia (Guatemala)

Objection to the reservation made by the Government of Guatemala in respect of article I, II and III, as these reservations

"are not in accordance with the principles contained in article I of the Charter of the United Nations and with the aims of the Convention."²⁶

Malta (9.7.1968)

"... declares that it does not consider itself bound by article III in so far as that article applies to conditions of service in the Public Service and to Jury Service."

Mauritius (18.7.1969)

"... declares that it does not consider itself bound by article III in so far as that article applies to conditions of service in the armed forces or to jury service."

Netherlands (30.7.1971)

"... is subject to the *reservation* that succession to the Crown in conformity with the relevant constitutional provisions shall be excluded from the application of article III of the Convention."

New Zealand (22.5.1968)

"Subject to a *reservation* with respect to Article III of the Convention, in so far as it relates to the recruitment and conditions of service in the armed forces of New Zealand."

Pakistan (7.12.1954)

"... shall have no application as regards recruitment to and conditions of services charged with the maintenance of public order unsuited to women because of the hazards involved."

Sierra Leone (25.7.1962)

"... declares that it does not consider itself bound by article III in so far as that article applies to recruitment to and conditions of service in the Armed Forces or to jury service."

Spain (14.1.1974)

"Article I and III of the Convention shall be *interpreted* without prejudice to the provisions which in current Spanish legislation define the status of head of family.

Articles II and III shall be *interpreted* without prejudice to the norms relating to the office of Head of State contained in the Spanish Fundamental Laws.

Article III shall be *interpreted* without prejudice to the fact that certain functions, which by their nature can be exercised satisfactorily only by men or only by women, shall be exercised exclusively by men or by women, as appropriate, in accordance with Spanish legislation."

Czechoslovakia (Spain)

Objection to the reservations made by the Government of Spain in respect of articles I, II and III, on the grounds that they are incompatible with the objectives of the Convention."²⁷

Swaziland (20.7.1970)

"... shall have no application as regards remuneration for women in certain posts in the Civil Service of the Kingdom of Swaziland."

United Kingdom (24.2.1967)

"Article III is accepted subject to *reservations*, pending notification of withdrawal in any case so far as it relates to:

- (a) succession to the Crown;
- (b) certain offices primarily of ceremonial nature;
- (c) the function of sitting and voting in the House of Lords pertaining to hereditary peerages and holders of certain offices in the Church of England;
- (d) recruitment to and conditions of service in the armed forces;"

on behalf of **Grenada**:

- (e) jury service

on behalf of the **Isle of Man**:

- (e) jury service

on behalf of **Montserrat**:

- (e) jury service

on behalf of the Kingdom of **Tonga**:

- (e) jury service

on behalf of the **Bahamas**, (withdrawn 12.2.1968):

- (e) jury service

on behalf of **Northern Ireland**, (withdrawn 15.10.1974)

- (f) employment of married women in Her Majesty's Diplomatic Service and in the Civil Service

on behalf of **Antigua**, (withdrawn 15.10.1974):

- (f) employment of married women in Her Majesty's Diplomatic Service and in the Civil Service

on behalf of **Hong Kong**; (withdrawn 15.10.1974):

- (f) employment of married women in Her Majesty's Diplomatic Service and in the Civil Service

on behalf of **St. Lucia**, (withdrawn 15.10.1974)

(f) employment of married women in Her Majesty's Diplomatic Service and in the Civil Service

on behalf of **St. Vincent**, (withdrawn 24.11.1967):

(f) employment of married women in Her Majesty's Diplomatic Service and in the Civil Service

on behalf of **Gibraltar**:

(g) remuneration for women in the Civil Service

on behalf of **Hong Kong**

(g) remuneration for women in the Civil Service

on behalf of the Protectorate **Swaziland**, maintained on independence:

(g) remuneration for women in the Civil Service

on behalf of the **Seychelles**, (withdrawn 15.10.1974):

(g) remuneration for women in the Civil Service

on behalf of **Guernsey**:

(h) the post of Bailiff

on behalf of the State of **Brunei**:

(i) the exercise of the royal powers, jury or its equivalent and the holding of certain offices governed by Islamic Law."

Article III of the Convention on the Political Rights of Women is formulated in a way which gives the impression that it expresses a categorical and unrestricted duty. Most states have accordingly termed their statements "reservations". The Spanish government is the only one that speaks of its statement as "interpreting" the provision of article III (as well as in article I and II).²⁸ Czechoslovakia reacting to the Spanish statement considered it nevertheless to contain reservations. Yugoslavia made "an objection to the reservation" of Guatemala. The Guatemalan statement resembles the Spanish one, but it is not clear if the Guatemalan government believed its statement to be a true reservation or only an interpretation.²⁹ Only two states presented "objections" to statements concerning article III. It is difficult to ascertain what the other confronted states considered these statements to be. What makes an analysis of these statements difficult is the fact that they refer to constitutional provisions not specifying if a derogation will be the result.

There are well-founded doubts as to the intent of Czechoslovakia and Yugoslavia to establish their reactions as formal objections. The Guatemalan and Spanish statements with their indeterminate scope pertained to articles I to III, which were the only material provisions of the treaty. The reservation clause under article VII stipulates the maximum effect rule which leaves no doubt that all treaty relations are abrogated between the reserving and the objecting states. Even on the basis of the minimum effect rule a formal

objection would apparently make the whole treaty inoperative between Guatemala and Yugoslavia respectively Spain and Czechoslovakia.³⁰ It is hard to imagine that this was the state of affairs desired by the disapproving states. Construing the Guatemalan and Spanish statements as interpretative declarations would have more satisfying results. Disapproving of the two statements as unilateral interpretations has only the effect of proving that the interpretations are not considered acceptable. Yugoslavia could still refer a dispute concerning Guatemala's application of article III to the ICJ for decision in accordance with article IX of the convention.³¹ Czechoslovakia would not have this remedy because it had itself refused to accept the compulsory jurisdiction of the ICJ.

That governments may have some doubts as to the scope of the obligations under article III is shown by the commentary to the Swedish bill concerning the ratification of the Convention.³² Though the Swedish government considered the office of clergyman to be a public office, it assumed it to be an office which was not covered by the Convention, just as military offices. Similar thoughts are found in the comments to the Swedish bill preparing the ratification of the 1979 Convention against the Discrimination of Women.³³ Some of the Swedish ministries proposed a reservation to article 11(1)(c) concerning the right of free choice of profession and employment, because women had only access to some military offices and not to offices of an administrative character in the Swedish Armed Forces.³⁴ The government finally decided that there was no need to formulate any reservations to this convention. Also there was some new legislation on the way to be introduced for realizing greater equality with respect to offices of command.

J. International Coffee Agreement (New York 28.9.1962)

Article 47(3)

Removal of obstacles to consumption

(1) The Members recognize the utmost importance of achieving the greatest possible increase of coffee consumption as rapidly as possible, in particular through the progressive removal of any obstacles which may hinder such increase.

(2) The Members affirm their intention to promote full international co-operation between all coffee exporting and importing countries.

(3) The Members recognize that there are presently in effect measures which may to a greater or lesser extent hinder the increase in consumption of coffee:

(a) import arrangements applicable to coffee, including preferential and other tariffs, quotas, operations of Government import monopolies and official purchasing agencies, and other administrative rules and commercial practices;

(b) export arrangements as regards direct or indirect subsidies and other administrative rules and commercial practices; and

(c) internal trade conditions and domestic legal and administrative provisions which may affect consumption.

Statements by:

No reactions

Cuba (21.8.1963)

"... considers it necessary to declare that that statement cannot be *interpreted* as

applying to the Cuban foreign trade monopoly, because that monopoly is an efficient instrument of Cuban policy for the development of Cuba's trade with every country, regardless of its economic, social and political system, on a basis of mutual advantage and respect, and for the development of Cuba's national economy, which contributes directly to raising the standard of living and increasing popular consumption, as can be verified in Cuba in the case of coffee and many other primary commodities."

Czechoslovakia (2.11.1965)

"... cannot be *interpreted* as applicable to the operations of the monopoly of foreign trade conditions which are an integral part of the economic and legal system of the Czechoslovak Socialist Republic."

USSR (31.12.1963)

"... believes it necessary to state that the above-mentioned reference cannot be *interpreted* as applicable to the foreign-trade monopoly of the USSR."

These three statements are unequivocal as to their nature. They must be considered to be interpretative declarations which is also proved by the expressions used therein. Cuba, Czechoslovakia and the USSR wanted to make it clear that the existence of foreign trade monopolies cannot be construed to be contrary to the obligations under the Coffee Agreement and in particular paragraphs 1 and 2 of article 47. The question if specific activities and operations of such organs of government monopolies are contrary to the obligations under the Agreement has to be assessed in each individual case. This is the only occasion on which such statements have been presented to a commodities agreement.³⁵ None of these statements has been reacted upon.

K. Convention on the Territorial Sea and the Contiguous Zone (Geneva 29.4.1958)

Article 24(1)

In a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to:

- (a) Prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea;
- (b) Punish infringement of the above regulations committed within its territory or territorial sea.

Statement by:

Italy (17.12.1964)

"... besides exercising control for the purposes of article 24, paragraph 1 in the zone of the high seas contiguous to the

Reactions by:

Japan (10.6.1968)

"2. In particular, the Government of Japan finds unacceptable the following *reservations*:

territorial sea, reserves the right to exercise surveillance within the belt of sea extending twelve nautical miles from the coast for the purpose of preventing and punishing infringements of the customs regulations in whatever point of this belt such infringements may be committed."

(b) The *reservation* made by Government of Italy to article 24 in the instrument of accession."

Netherlands (18.2.1966)

"... declare that they do not find acceptable the *reservation* made by the Government of the Republic of Italy to article 24, paragraph 1."

United States (17.6.1965)

"*Objection* to the *reservation* made by the Government of Italy in its instrument of accession."

On closer analysis it has to be realized that the Italian statement is not an interpretative declaration. It has the nature of a reservation, because it intends to extend the rights of the coastal state in the contiguous zone. The Convention gives a right to prevent infringement of certain regulations from being committed in the territory or territorial sea of the coastal state as well as to punish infringement of these regulations committed in the territory or territorial sea of the coastal state. Italy reserves such rights with respect to infringements "in whatever point of this belt" they may be committed. This will comprise acts not only occurring within the land territory and the territorial sea of Italy being 6 n.m. of width (at the time of the Italian accession in 1964), but also in any part of the contiguous zone outside the territorial sea. The reservation extended the claim-rights of Italy to a new category of acts and enlarged at the same time the duties of the other non-objecting states. Here we do have a reservation which seems to have imposed new duties on the confronted states.

In 1974 the Italian Code of Navigation from 1942 was amended to extend the breadth of the Italian territorial sea to 12 n.m.³⁶ However the Italian customs legislation from 1940 which states that the customs zone shall be twice the breadth of the territorial sea, has not been amended.³⁷ Strictly speaking the Italian customs zone would extend to 24 n.m. from the low water mark. This would not comply with article 24(2) of the Territorial Sea Convention which does not allow for an extension of the contiguous zone beyond 12 n.m. from the baseline. Solving the conflict in accordance with the Geneva Convention signifies that the customs zone is identical with the territorial sea. Consequently the Italian statement loses the character of a reservation.³⁸

L. Convention on the High Seas (Geneva 29.4.1958)

Article 15

Piracy consists of any of the following acts;

(1) Any illegal act of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(3) Any act of inciting or of intentionally facilitating an act described in sub-paragraph 1 or sub-paragraph 2 of this article.

Statements by:

Albania (7.12.1964)

"... declares that the definition of piracy as given in the Convention is not consistent with present international law and does not serve to ensure freedom of navigation on the high seas."

Bulgaria (31.8.1962)

identical with Albania's statement

Byelorussia (27.2.1961)

ditto

Czechoslovakia (31.8.1961)

ditto

GDR (27.12.1973)

ditto

Hungary (6.12.1961)

ditto

Mongolia (15.10.1976)

ditto

Poland (29.6.1962)

ditto

Romania (12.12.1961)

ditto

Ukraine (12.1.1961)

ditto

USSR (22.11.1960)

ditto

Reactions by:

FRG (Albania, Bulgaria, GDR, Poland, Romania, USSR, Byelorussia, Ukraine, Czechoslovakia, Hungary: 15.7.1974; Mongolia: 2.3.1977)

"... considers the following *reservations* to be inconsistent with the aims and purposes of the Convention ... and the therefore unacceptable:

4. The *declaration* made by ... to the definition of piracy as given in the Convention in so far as the said *declarations* are to be qualified as *reservations*."

Netherlands (Albania, Bulgaria, Byelorussia, Czechoslovakia, Hungary, Poland, Romania, Ukraine. USSR: 18.2.1966)

"... declare that they do not find acceptable

the *declarations* made by ... as far as these *declarations* amount to a *reservation*."

Thailand (Albania, Bulgaria, Byelorussia, Czechoslovakia, Hungary, Poland, Romania, Ukraine, USSR: 2.7.1986)

Objections to the following *reservations*

"*Declarations* to article 15 made by ..."

The eleven statements all presented by socialist states reveal a dissatisfaction with the definition of piracy as a crime under international law. The definition was thought to be too narrow, omitting a number of acts that according to the socialist states should have been embraced by the definition. Only three states reacted to these statements. The governments of the FRG and the Netherlands clearly showed their uncertainty as to the nature of these statements. They found these statements unacceptable "as far as they amount to reservation". The formal reactions were dictated by con-

siderations of prudence. It must be considered evident that the statements have to be construed as declarations of dissatisfaction with article 15 and its adopted formulation. Possibly these statements may be invoked in future to propagate a broad interpretation of article 15. The formal disapproval by a number of states will make it more difficult for the declaring states to provide evidence for the correctness of their unilateral interpretations. It will be problematic to consider the statements to be reservations proper. It is not clear to what extent the statements would broaden the concept of piracy and thus enlarge the field of application of the rules on piracy. It is unreasonable to construe silence as tacit acceptance of norms the scope of which will be determined unilaterally by the declaring states.³⁹

M. Convention on the Continental Shelf (Geneva 29.4.1958)

Article 1

For the purpose of these articles the term 'continental shelf' is used as referring

(a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits the exploitation of the natural resources of the said areas;

(b) to the seabed and subsoil of similar submarine areas adjacent to the coast of islands.

Statements by:

Canada (6.2.1970)

"... wishes to make the following *declaration* ... the presence of an accidental feature such as a depression or a channel in a submerged area should not be regarded as constituting the interruption in the natural prolongation of the land territory of the coastal state into and under the sea."

France (14.6.1965)

"... the expression 'adjacent' areas implies a notion of geophysical, geological and geographical dependence which *ipso facto* rules out an unlimited extension of the continental shelf."

Reactions by:

United States (Canada: 16.7.1970)

"... does not find acceptable the *declaration* made by the Government of Canada ... considers that Convention to be in force and applicable between it and Canada, but that such application does not in any manner constitute any concurrence by the United States in the substance of the declaration made by Canada with respect to article 1 of the Convention."

Canada (France: 6.2.1970)

"... reserves its position concerning the *declaration* of the Government of the French Republic ..."

Spain (France: 25.2.1971)

"... reserves its position with respect to the *declaration* made by the Government of the French Republic ..."

Thailand (France: 2.7.1968)

made objections to

"... the *reservations* to articles 1 ... made by the Government of France."

United Kingdom (France: 14.1.1966)

"... take note of the *declaration* made by the Government of the French Republic and reserve their position concerning it."

Tonga (France: 29.6.1971)

maintains UK objections and formal reactions

Fuji (France: 25.3.1971)

ditto

United States (France: 9.9.1965)

"... The *declarations* by France with respect to articles 1 and 2 are noted without prejudice."

Spain (25.2.1971)

"... declares, in connexion with article 1 of the Convention, that the existence of any accident of the surface, such as a depression or a channel, in a submerged zone shall not be deemed to constitute an interruption of the natural extension of the coastal territory into or under the sea."

Reservations to article 1 of the Continental Shelf Convention are not permitted according to the reservation clause in article 12. This article together with articles 2 and 3 form the basic provisions of the Convention. The three articles provide the concepts which rule the application of all the other provisions of the Convention. Where a reservation is presented to article 1 it must be considered null and void.⁴⁰ The French statements have been construed as unilateral interpretations in character and not binding on the other parties. Seven of the confronted states thought it advisable to safeguard their interests in this question by 'reserving their position' or 'noting the statements without prejudice'. This is, as mentioned before, a measure of caution, there being no obligation to express disapproval within a fixed period, or at a certain moment, in order to avoid silence being construed as tacit acceptance of the interpretation. If this was not the case, interpretative declarations would in their effects amount to reservations and the prohibition against reservations would turn out to be illusory. Only Thailand called the French statement a reservation. By objecting Thailand could contend that either the French accession was invalid and that it was not in treaty relations with France or that only the "reservation" was invalid and that it was in treaty relations as if the "reservation" did not exist. The first solution seems unreasonable and was perhaps not contemplated by Thailand. The second solution leads us to a result which does not lie very far away from the one we would achieve if we were to construe the statement as an interpretative declaration. A reservation declared invalid because prohibited or incompatible is not opposable even if designated as "interpretative declaration" whether openly protested against or not.

Article 2(4)

The natural resources referred to in these articles consist of the mineral and other

non-living resources of the seabed and subsoil together with the living organisms belonging to the sedentary species, that is to say, organisms, which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.

Statement by:

France (14.6.1965)

"... considers the expression 'living organisms belonging to the sedentary species' must be *interpreted* as excluding crustaceans, with the exception of the species of crab termed 'barnacle';..."

Reactions by:

Canada (6.2.1970)

"... reserves its position with respect of the *declaration* ..."

United Kingdom (14.1.1966)

"This *declaration* does not call for any observations ..."

Fiji (25.3.1971)

maintains the formal reactions of the UK

Tonga (29.6.1971)

ditto

United States (9.9.1965)

"The *declarations* by France with respect to article 1 and 2 are noted without prejudice."

The formal reactions to the French statement are similar as those to the French statement regarding article 1. However, none of the reacting states designated the statement a "reservation". In this case all the states involved, the declaring state and the reacting states, shared the view that they had to deal with an interpretative declaration. It is interesting to note the difference in wording of the formal British reaction compared with its reaction to the declaration concerning article 1. It looks as if the United Kingdom approves of the French interpretation. It appears from the utterance of the British delegate to the Geneva Conference that neither British fishermen nor consumers had any interest in the species of crustacean called barnacle, as it is not considered a delicacy in the British Isles.⁴¹

Article 6

1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite to each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of the State is measured.

3. In delimiting the boundaries of the continental shelf, any lines which are drawn

in accordance with the principle set out in paragraphs 1 and 2 of this article should be defined with reference to charts and geographical features as they exist at a particular date, and reference should be made to fixed permanent identifiable points in the land.

Statements by:

France (14.6.1965)

"In the absence of a specific agreement, the Government of the French Republic will not accept that any boundary of the continental shelf determined by the application of the principle of equidistance shall be invoked against it:

– if such boundary is calculated from baselines established after 29 April 1958;

– if it extends beyond the 200-metre isobath;

– if it lies in areas where, in the Government's opinion there are 'special circumstances' within the meaning of article 6, paragraphs 1 and 2, that is to say: The Bay of Granville, and the areas of the Straits of Dover and the North Sea off the French Coast."

Reactions by:

Canada (France 6.2.1970)

"... it does not find acceptable the *reservation* ..., insofar as that *reservation* relates to a boundary calculated from baselines established after 29 April 1958 or to a boundary extending beyond the 200 metre isobath.

... reserves its position concerning the *reservation* ..., insofar as that *reservation* relates to a boundary in areas where there are 'special circumstances' within the meaning of article 6, paragraphs 1 and 2".

Netherlands (France: 18.2.1966)

"... do not find acceptable ... the *reservations* ..."

Norway (France 9.9.1971)

"... do not find acceptable the *reservations* ..."

Spain (France 25.2.1971)

"That it deems unacceptable the *reservation* made by the Government of the French Republic to article 6 paragraph 2, especially as concerns the Bay of Biscay."

Thailand (France: 2.7.1968)

made objections to "the *reservations* to the articles ... and 6 (paragraphs 1 and 2) made by the Government of France."

United Kingdom (France: 14.1.1966)

"... are unable to accept the *reservations*".

Fiji (France: 25.3.1971)

maintains all the objections of the UK

Tonga (France: 29.6.1971)

ditto

United States (France: 19.9.1962)

"... does not find the following *reservations* acceptable: ... The reservations to articles 4, 5 and 6 ..."

Yugoslavia (France: 29.9.1965)

"... does not accept the *reservation* ... with respect to article 6 ..."

China, Republic of (12.10.1970)

"With regard to the determination of the boundary of the continental shelf as provided in paragraphs 1 and 2 of article 6 of the Convention, the Government of the Republic of China considers:

(1) that the boundary of the continental shelf appertaining to two or more States whose coasts are adjacent to and/or opposite each other shall be determined in accordance with the principle of natural prolongation of their land territories; and

(2) that in determining the boundary of the continental shelf of the Republic of China, exposed rocks and islets shall not be taken into account".

Greece (6.11.1972)

"... makes a *reservation* with respect to the system of delimiting the boundaries of the continental shelf appertaining to States whose coasts are adjacent or opposite each other, provided for in article 6, paragraphs 1 and 2, of the Convention. In such cases, the Kingdom of Greece will apply, in the absence of international agreement, the normal baseline system for the purpose of measuring the breadth of the territorial sea."

Iran (on signing 28.5.1958)

"... to make the following *reservations*:

(b) Article 6: With respect to the phrase 'and unless another boundary line is justified by special circumstances' included in paragraphs 1 and 2 of this article, the Iranian Government accepts this phrase on the *understanding* that one method of determining the boundary line in special circumstances would be that of measurement from the high water mark."

Venezuela (15.8.1961)

"... declares with special reference to article 6 that there are special circumstances to be taken into consideration in the following areas: the Gulf of Paria, in so far as the boundary is not determined by existing agreements, and in zones adjacent thereto; the area between the coast of Venezuela and the Islands of Aruba; and the Gulf of Venezuela."

Yugoslavia (28.1.1966)

"In determining its continental shelf, Yu-

Netherlands (Venezuela: 18.2.1966)

"... reserve all rights regarding the *reservation* in respect to article 6 made by the Government of Venezuela when ratifying the present Convention."

goslavia recognizes no 'special circumstances' which should influence that delimitation."

The French statement encompasses reservations which are of the kind that restrict the rights of the other parties. The competence of neighbouring coastal states whose coasts are opposite or adjacent to the French coast to delimit their continental shelf by applying the principle of equidistance is restricted according to the conditions set out in the French statement. Their disability is correspondingly enlarged. This is naturally only the case where the French reservation has been accepted and become effective.

The French statement comprises many parts, each of which needs an independent evaluation. France accepts the idea that the delimitation in the first place has to be made by a specific agreement. In the absence of such an agreement the equidistance principle would apply according to the Convention. France is not ready to accept the equidistance principle in its whole width, but restricts it on temporal and geographical grounds. It will not be accepted in the case where the baselines are established after the date of signing the Continental Shelf Convention. Neither will it recognize the principle where the delimitation has to be made beyond the 200-metre isobath. In this respect the French statement contains two reservations of the restricting kind. The Geneva Convention provides in itself an exception to the equidistance principle. It will not be applied in areas where there are considered to be 'special circumstances'. This part of the statement would apparently not be considered a reservation as it does not alter the right to invoke the condition of 'special circumstances'. France only specifies the areas in which according to her opinion these circumstances are present. Where such 'special circumstances' are present is a question of evaluation and the convention does not give any further guidelines in this respect. The decision as to the presence of 'special circumstances' is a problem of implementation and the arguments needed to arrive at a solution have to be found outside the Convention. The determination of the existence of 'special circumstances' in any particular area is a question that has to be settled among the states having a special interest in the matter.⁴² A confronted state not reacting to this part of the French statement cannot be deemed to have accepted the French view on the basis on the rules of tacit acceptance of reservations but possibly to have acquiesced in it in accordance with the reasoning of the ICJ in the *Fisheries* case.⁴³

If one were to follow the view that a declaration of interpretation (in this case more correctly a declaration of application) which is presented as an absolute condition for participation in a treaty amounts to a reservation, the French statement would even in this part constitute a reservation. The Court of Arbitration in the *Anglo-French Continental Shelf* arbitration reasoned along these lines.⁴⁴

The reactions of the confronted states have generally been directed against the whole of the French statement without making distinction with respect to the last part concerning 'special circumstances'. Only Canada presented a separate observation as to this part. It termed that part also as a "reservation", but stated only that it was "reserving its position" with regard to it. Venezuela

made a similar statement as France to the 'special circumstances' clause. In this case only the Netherlands reacted using similar expressions as Canada. Neither Canada nor the Netherlands wanted article 6 to become inapplicable. Yugoslavia commented on the 'special circumstances' clause, saying that according to her opinion there were no such circumstances in the Adriatic bearing on the delimitation of the Yugoslavian continental shelf. It is submitted that any statement indicating if there are or are not 'special circumstances' is as a rule not a proper reservation derogating from any norm under the Convention, but more a case of interpretation or application of the Continental Shelf Convention, which could not be considered as tacitly accepted under the reservation regime. Thus for example Albania not having reacted on the Yugoslav statement cannot be assumed to have automatically accepted the view of the Yugoslav government.⁴⁵ Some of the states reacting to the French statement have not had any direct interest in the case. Their protests were considered a matter of principle.

N. The United Nations Convention on the Law of the Sea (10.12.1982)

Statement by:

Yemen, Arab Rep. (on signing 10.12.1982)

"3. The Yemen Arab Republic confirms its national sovereignty over all the islands in the Red Sea and the Indian Ocean which have been its dependencies since the period when the Yemen and the Arab countries were a Turkish administration."

Reaction by:

Ethiopia (8.11.1984)

"Paragraph 3 of the declaration relates to claims of sovereignty over unspecified islands in the Red Sea and the Indian Ocean which clearly is outside the purview of the Convention. Although the declaration, not constituting a reservation as it is prohibited by article 309 of the Convention, is made under article 310 of same and as such is not governed by articles 19–23 of the Vienna Convention on the Law of Treaties providing for acceptance of and objections to reservations, nevertheless, the Provisional Military Government of Socialist Ethiopia, wishes to place on record that paragraph 3 of the declaration by the Yemen Arab Republic cannot in any way affect Ethiopia's sovereignty over all the islands in the Red Sea forming part of its national territory."

The statement by Yemen does not bear upon any specific provision of the 1982 Law of the Sea Convention. It does not amount to a reservation because of the prohibition against reservations under article 309, but because of its very contents.⁴⁶ It is further doubtful if it constitutes a declaration under article 310. This article states that:

"Article 309 does not preclude a State, when signing, ratifying or acceding to this Convention, from making declarations or statements, however phrased or named, with a view, *inter alia*, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or modify the legal effect of the provisions of this Convention in their application to that State."

The statement by Yemen concerns the sovereignty over certain islands but it does not as such relate to the norm system under the Convention. The Ethiopian reaction makes it clear that the rule of tacit acceptance is not assumed to apply (by analogy) to declarations short of reservation. The formal disapproval by Ethiopia is only a precautionary measure in order to safeguard its interests in the Red Sea area.⁴⁷

O. Vienna Convention on the Law of Treaties (23.5.1969)

Article 7(2)

Full Powers

In virtue of their functions and without having to produce full powers, the following are considered as representing the State:

(a) Heads of State, Heads of Government and Ministers of Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;

(b) heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;

Statement by:

Finland (19.8.1977)

"Finland declares its *understanding* that nothing in paragraph 2 of article 7 of the Convention is intended to modify any provision of internal law in force in any contracting State concerning competence to conclude treaties. Under the Constitution of Finland the competence to conclude treaties is given to the President of the Republic, who also decides on the issuance of full powers to the Head of Government and the Minister of Foreign Affairs."

Reaction by:

United Kingdom (7.12.1977)

"... they do not regard that *declaration* as in any way affecting the interpretation or application of article 7."

According to the wording used in both the Finnish statement and the British reaction both governments preferred to construe the statement as an interpretative declaration. The United Kingdom made it clear that the Finnish interpretation did not warrant its view on the correct implementation of the norms under article 7. The case raises the question as to the implications of the Finnish statement. Has the intention been to reserve the right to invalidate the Finnish consent to a treaty in the case where for example the foreign minister has acted without full powers issued by the President? Does the statement appear to be a reservation?

The preparatory work of the Vienna Convention however shows that article 7(2) was intended to create only a presumption for the competence of the head of the state, the head of government and the foreign minister to undertake the various acts for concluding a treaty. The state which wants to invoke any restriction on the authority of these state organs has the onus.⁴⁸ Lack of competence may invalidate the consent to be bound by a treaty only on the conditions set down in article 46 of the Vienna Convention. This means that the violation must be manifest and concern some fundamental provisions of na-

tional law. Was the Finnish statement intended to be an anticipatory discharge of the onus in the case one wanted to invalidate consent where a state organ other than the President had acted without full powers? Apparently not. The explanatory statement to the Finnish bill concerning the ratification of the Vienna Convention mentions that allowance is made for various state organs to act without presenting full powers. Where treaties are concluded between the Nordic countries full powers are often not required. As article 7(2) was not intended to widen the treaty-making power of other state organs than the head of state but only to facilitate the conclusion of treaties, there was not considered to be any conflict between this provision and article 33 of the Finnish Constitution.⁴⁹ The Finnish statement is therefore only of a clarifying nature.

Article 52

Coercion of a State by the threat or use of force

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

Statement by:

Syria (2.10.1970)

"... *interprets* the provisions in article 52 as follows:

The expression 'the threat or use of force' used in this article extends also to the employment of economic, political, military and psychological coercion and to all types of coercion constraining a State to conclude a treaty against its wishes or its interests."

Reactions:

Japan (2.7.1981)

"... does not accept the *interpretation* of article 52 ... , since that *interpretation* does not correctly reflect the conclusions reached at the Conference of Vienna on the subject of coercion."

Sweden (4.2.1975)

"... since article 52 refers to the threat or use of force in violation of the principle of international law embodied in the Charter of the United Nations, it should be interpreted in the light of the practice which has developed or will develop on the basis of the Charter."

United Kingdom (25.6.1971)

"... does not accept that the *interpretation* ... correctly reflects the conclusions reached at the Conference of Vienna, on the subject of coercion; the Conference dealt with this matter by adopting a Declaration on this subject which forms part of the Final Act;"

United States (26.5.1971)

'... is also concerned about ... *reservation* D concerning its interpretation of the expression 'the threat or use of force' in Article 52. However in view of the United States Government's intention to reject treaty relations with the Syrian Arab Republic under all provisions in Part V to which *reservations* C and D relate, we do not consider it necessary at this time to object formally to those *reservations*.'

The Syrian statement must be seen in the light of the lengthy debates in the Vienna Conference on the notion of coercion against a state invalidating treaties. The socialist states and states representing the Third World were in favour of formulating the concept of invalidity of treaties due to coercion of a state in broad terms. The Western states were not eager to insert an express reference to economical and political pressure in article 52, some of them were completely against the idea, others again not condemning it in substance but thinking it impossible to arrive at a sufficiently clear formulation at the present stage.⁵⁰ The compromise was reached by letting article 52 refer to the principles in the Charter of the United Nations leaving the concept to crystallize through the practice of the United Nations.⁵¹ A separate declaration on the prohibition of the threat or use of force was adopted by the Vienna Conference:

The United Nations Conference on the Law of Treaties

1. Solemnly condemns the threat or use of pressure in any form, whether military, political, or economic, by any State in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of the sovereign equality of States and freedom of consent.⁵²

The statement was a manifestation that the Syrian government still maintained its view as propagated during the Conference on the correct construction of the concept of coercion of a state invalidating a treaty. How the concept will be definitely clarified is left to be settled in the future. Some states thought it nevertheless wise to notify their view that the Syrian statement was only to be considered as a unilaterally expressed understanding of article 52. The majority of the reacting states designated the Syrian statement as a declaration of interpretation which they were not ready to approve. Only the United States termed the statement a "reservation". It abstained from making a separate formal objection only because it had presented a qualified objection with respect to that part of the Syrian statement (E) which excluded the Annex on obligatory conciliation from applying. Through its qualified objection no provision in Part V of the Convention to which article 52 belongs was to apply between the United States and Syria. Although the states which considered the Syrian statement to be a declaration of interpretation wanted to reserve their position, it cannot be asserted that they acted out of a feeling of obligation. The silence by other states cannot be construed as acceptance of the Syrian position. The reactions by Japan, Sweden and the United Kingdom as well as the United States were in fact superfluous, because none of these states accepted treaty relations with Syria under Part V.⁵³ It seems strange that the USA preferred to treat the statement as a reservation, although it appears to be a case of an interpretative declaration.

CHAPTER 27

FINAL COMMENTS ON STATEMENTS OF INTERPRETATIVE OR DOUBTFUL NATURE

The presentation of a number of statements with or without reactions shows that states have had true difficulties in ascertaining the actual character of statements. This uneasiness is found both on the side of the declaring states and on the side of the reacting states. Practice does not provide any guidance as to a special norm of customary international law concerning acceptance of an interpretative declaration or a statement of obscure character.

The general rule is that confronted states do not react to statements, be they true reservations, declarations of interpretation, etc., or statements of an obscure character. Those states reacting have frequently not undertaken a thorough analysis of the effects and the nature of statements they are confronted with. A confronted state analyzing a statement may come to following conclusions: (a) the statement is a reservation and will be subject to the rules on objections and tacit acceptance; (b) the statement is an interpretative declaration and one may protest it or reserve one's position if unable to make up one's mind on the correct interpretation and (c) it is not possible to determine the actual character of the statement and any silence cannot be construed as a tacit acceptance.

The formal reactions to interpretative declarations and statements the nature of which is uncertain are so few that the preconditions for asserting the rise of a new binding rule are not present. It is not realistic to argue that states have consented to any kind of obligation to react towards interpretative declarations or obscure statements. It would be a hopeless task to prove that the few states reacting to interpretative declarations and obscure statements, and the vast majority not doing it, have done so with the conviction that there is an obligation to protest in order to avoid the presumption of acceptance.¹

27.1 THE DISTINCTION BETWEEN SIMPLE AND QUALIFIED INTERPRETATIVE DECLARATIONS

Interpretative declarations should as a rule be governed by the rules which apply to unilaterally presented interpretations. Unilateral interpretations will not bind the other parties. This is only the case once acquiescence can be proved. Confronted states which have not been able to evaluate the effects of the interpretation will, therefore, not find themselves bound by an interpretation about which they have not been able to make up their mind. It is not reasonable to require that confronted states should react if they do not know the implications of that interpretation. Even if the rule on tacit acceptance was to be construed as a rule of presumption, it would anyway have the effect of

putting the onus on the non-reacting states who may find it difficult to discharge the burden of proof. It behoves the declaring state which wants to oppose the unilateral interpretation to prove that a non-reacting state has acquiesced in this interpretation. In the case of reservations, the non-reacting state will have to prove that it would have no intention of accepting a reservation even if it had not proffered an objection when consenting to the treaty, or within the period of 12 months from the notification of the reservations.

This solution has the disadvantage for the declarant state in that, if a statement is construed as a simple interpretation, the declarant state will have to submit to a different interpretation where such is authoritatively established. If the declaring state then acts in accordance with its own interpretation it commits a breach of the treaty and incurs international responsibility.

If a state does not wish to abandon its interpretation even in the face of a contrary authoritative decision by a court, it may run the risk of violating the treaty when applying its own interpretation. In order to avoid this, it would have to qualify its interpretation as an absolute condition for participation in the treaty. The statement's nature as a reservation is established at the same time the propagated interpretation is established as the incorrect one.² The burden of proof should lie on the declaring state which has the better facilities to discharge it by providing the documents relating to the ratification of the treaty. The opinion of the European Commission of Human Rights in the *Temeltasch* case provides interesting reading.³ The Commission had to determine the nature of a statement by Switzerland as far as it concerned article 6(3)(e) of the European Convention on Human Rights on the free assistance of an interpreter for a person charged with a criminal offence. The following formulation was used in the statement:

"The Swiss Federal Council declares that it interprets the guarantee of free legal assistance and the free assistance of an interpreter, in article 6, paragraph 3(c) and (e) of the Convention, as *not permanently* absolving the beneficiary from payment of the resulting costs." (emphasis added)⁴

Switzerland had designated this as an "interpretative declaration" though it had termed other parts of its statement as "reservations". The Commission decided in accordance with the Swiss allegation that the "interpretative declaration" was in fact a reservation.⁵ The Commission came to this conclusion on the basis of the terms used in the statement and the Swiss *travaux préparatoires*. The terms, "... taken by themselves, already show an intention of the Government to prevent the principle of absolute assistance ... from being invoked against it".⁶ The material relating to the preparatory work was largely the same as had already been presented to the Swiss Federal Court. It seems that no independent and critical evaluation of the material had been undertaken. The preparatory work does not, however, provide unequivocal proof of the intention of the Swiss government at the time the statement was made. The view of Federal Councillor Graber that "where the Convention and domestic law are incompatible we shall make reservations and on a question of interpretation we shall make interpretative declarations" would equally speak in favour of a simple declaration of

understanding.⁷ The preparatory work also shows that the Swiss Federal Justice Office did not advocate the formulation of a reservation "in order not to prejudice the question of interpretation on which the European Court of Human Rights is the ultimate authority". There are thus equally good reasons for believing that the Swiss government did not make its interpretation an absolute condition for ratifying the convention. What is essential is to establish the intention at the time the statement was made, and not to depend on how the declaring state conceives it at the moment when the matter is under dispute. Naturally the declaring state tends to characterize its statement in a way that best satisfies its interests at the time of the dispute. The preparatory work does not convince one that Switzerland had the clear and unequivocal intention to maintain its interpretation against a judicial decision to the contrary.⁹

In the *Luedicke* case from 1978 the European Court of Human Rights held that the "clear and determinate" meaning of article 6(3)(e) stipulates a "once and for all exemption and exoneration" from the duty to pay for legal assistance.¹⁰ Only at this moment was it possible to prove the derogatory content of the Swiss statement. If the Swiss "interpretative declaration" had been expressed in categorical terms as a condition for participation in the convention the declaration would have materialized as a true reservation at the moment the decision was passed.

The FRG when preparing the ratification of the European Convention on Human Rights held the view that the guarantees of free assistance were not to be understood as providing complete exemption from the payment of costs. The FRG did not consider it necessary to present an interpretative declaration.¹¹ According to the judgement in the *Luedicke* case the West-German courts had violated article 6(3)(e). This decision will be binding for the FRG even in the future.¹² The whole situation has been considered somehow disturbing. A state which is convinced that its interpretation is correct, but has not communicated it in formal statement, may be found to have violated a treaty in the case the court repudiates its interpretation. A state which has presented a formal interpretative declaration has the opportunity to prove later that it had, in fact, intended the interpretation to be an absolute condition for participation in the treaty.

The Court of Arbitration in the *Anglo-French Continental Shelf* arbitration also considered the problem of whether a statement had the nature of a simple, or a qualified, interpretative declaration. It accepted France's view as to the nature of the French statement concerning the presence of special circumstances. France contended that its statement did not, according to the "clear terms of the text" contain a simple interpretative declaration.¹³ The Court stated that although the statement as far as it relates to the presence of special circumstances "... doubtless has within it elements of interpretation, it also appears to constitute a specific condition imposed by the French Republic on its acceptance of the delimitation regime provided for in article 6".¹⁴ It further specified what it meant by the conditional character of the statement:

“This condition, *according to its terms*, appears to go beyond mere interpretation; for it makes the application of the regime dependent on acceptance by the other State of the French Republic’s designation of the named areas as involving ‘special circumstances’ regardless of the validity or otherwise of the designation under Article 6.” (emphasis added)¹⁵

In the absence of specific agreement France “will not accept” that the equidistance principle is invoked against her in some specified areas. The Court had apparently drawn its conclusion on the sole basis of the wording of the French statement and the clarification provided by the French government as to its original intention. The Court has apparently not ventured into the preparatory work as had the European Commission in the *Temeltasch* case.¹⁶

The formulation is, in fact, not more categorical than the one in that part of the French statement which bears upon article 2(4) concerning the concept of living resources of the continental shelf. France urges that article 2(4) “must be interpreted” in a certain way. The use of categorical expressions does not *per se* change a statement into a reservation. Most of the reacting states did not consider this part of the French statement to be a reservation. As such it would have anyway been prohibited according to article 12 of the convention.¹⁷

The Court of Arbitration was faced with a situation where a declaring state, France, and a reacting state, the United Kingdom, disagreed on the nature of the statement as far as it indicated the areas where there were special circumstances, which would make the equidistance method inapplicable. One of these areas was the Bay of Granville. As there was no agreement between France and the UK concerning the delimitation of the continental shelf in the Channel Islands area, the equidistance rule became in principle applicable. The British government considered that the French statement to this part was only an interpretative declaration and as such not opposable to the UK. The fact that the UK termed its disapproval an “objection” may not be significant.¹⁸ The disapproval referred at the same time to all those three parts of the French statement which related to article 6. In as far as the French statement excluded the application of the equidistance principle in areas where baselines had been established after the adoption of the Continental Shelf Convention on 29 April 1958, and in areas beyond the 200-metre isobath, it contained reservations of the restricting kind.¹⁹ This was also the view of the Court, a view not really contested by the UK.²⁰ The baselines-reservation was irrelevant in the present dispute as the UK had not invoked any baselines established after the above-mentioned date.²¹ The isobath-reservation was relevant for the delimitation in the Atlantic.²²

The Court, however, concluded that the result was the same whether the provisions of article 6, or the norms of international custom were applied.²³ The special circumstances-declaration by France became relevant for the delimitation in the Channel Islands area. The argument of the UK concerning this declaration is twofold. It held the declaration to encompass a unilateral interpretation, which was not opposable to the UK. Furthermore there were no special circumstances in the Bay of Granville that would have prevented the equidistance principle from applying. France contended firstly, that the statement with respect to the special circumstances requirement was a

reservation and, secondly, that there were special circumstances making the equidistance method inapplicable in the Channel Islands area. The Court shared the French view as to the nature of the relevant part of the statement, though it did not accept the argument that the UK disapproval excluded the whole convention or the whole of article 6 from applying. The Court appeared to have taken its decision solely on the basis of the subjective criterion, France's assumed wish to make its view on the presence of special circumstances the absolute condition for its participation in the Continental Shelf Convention. The endorsement of the view of the French government as to the original intentions behind the statements was perhaps too precipitate.²⁴ It is submitted that the Court neglected the material aspect of reservations, the effect of modifying norms. The idea of derogation is the basic component in the concept of reservation. This especially so as the French view was contested by the UK. Determining if there are special circumstances in a certain region is a problem of applying the delimitation regime and not a question of modifying it.²⁵ It is not easy to consider the statement as a derogation from a norm. The Court itself admitted that article 6 does not define what is meant by special circumstances nor indicate any criteria which would help establish the presence of special circumstances.²⁶

The Court should first have considered whether or not there are special circumstances in the Bay of Granville which exclude the principle of equidistance from applying. Had the Court been convinced about the presence of special circumstances in the area, and it is likely that this was the case, the French view would have been bound to be correct. The statement would not have resulted in any derogation from the delimitation regime under article 6, and hence it could not be construed as a reservation. Because the UK had considered its reaction to be a protest short of objection against a unilateral interpretation, it would have been compelled to recognize the view of the Court and would have had to accept that the equidistance principle was not applicable. The Court would have accepted the UK contention as far as it concerned the nature of the statement, but would have rejected it as far as it concerned the application of article 6. Therefore article 6 could be applied in its entirety. The correct application of the article prevents the equidistance principle from being invoked.

If the Court had found that there were no special circumstances present in the Bay of Granville, the equidistance method would be used according to article 6. The French statement would therefore conflict with the correct implementation of the delimitation regime. Only at this moment would it become necessary to reflect on the subjective criterion of conditionality. If France at the moment of accession merely had declared her understanding of the correct application of article 6, the statement would be a simple interpretative declaration; if she had constituted it as a definite condition for participation, it would amount to a qualified interpretative declaration. In the first case article 6 would still apply and the Court would have had to decide according to the contention of the UK. In the latter case the Court must have had to decide to what extent article 6 is not applicable. The Court assumed the interpretation to be qualified. Although the UK considered its disapproval to be a simple protest against the French statement as to the presence of special cir-

cumstances, the Court construed it to be a formal objection. The task was then to decide to what extent the objection hindered article 6 from applying. It was not part of the discussion if silence with respect to the French statement on the special circumstances amounted to tacit acceptance. There is therefore no authoritative opinion on the question whether a party believing its statement to be a reservation may validly oppose it to a non-reacting state which has believed that statement to contain only a simple interpretation.²⁷

The opinion of the UK, that France had the *onus probandi* with respect to the existence of special circumstances, was not accepted. The Court considered itself to be competent to make an independent evaluation of the question. Against the background of this assertion it seems strange that the Court was not more active in finding out the intentions of France at the moment the statement was notified in connection with accession, but relied on what France assured it to be the “clear terms” of the statement.²⁸

As the Court found that the special circumstances – equidistance rule under article 6 could not apply in the Channel Islands area, it had to look for a rule of customary international law. On the basis of the reasoning in the *North Sea Continental Shelf* case, it concluded that the goal of any delimitation of the continental shelf is to arrive at an equitable delimitation.²⁹ In order to achieve this goal, one cannot avoid considering the geophysical features of the region. Even the equidistance method may be reintroduced as far as it satisfies the norm that delimitation should be effected according to equitable principles. We find therefore, that the special circumstances – equidistance rule may be applied in spite of the fact that the deregulatory effect of the UK objection prevents it from applying on the basis of article 6.

The UK contended that the effect of the French statement was to hinder a unilateral delimitation on the basis of the special circumstances – equidistance rule, but that it could not prevent a court from applying it. The Court was unable to accept this view, because it felt that this may disown the French statement of any effect.³⁰ The Court was nevertheless not hindered from applying it insofar as it was an instance of the basic principle of equitable delimitation.

27.2 STATEMENTS RELATING TO DOMESTIC LAW

Statements that declare a treaty to be applicable to the extent that its provisions do not contradict national legislation are often of an obscure nature. The declaring states frequently do not clarify to what extent national legislation derogates from the norms in the treaty. The confronted states find it therefore difficult to choose the most appropriate way of reacting. A formal objection may have effects that the reacting state would not accept once the nature and scope of the statement has been clarified. A state may feel compelled to present a formal objection, even if it is not certain as to the concrete effects of the statement, in order to be on the side of certainty and forestall the bindingness of the statement. If it happens that the statement turns out to be a correct reading of the obscure provision, the declaring and the reacting state may find that the subject-matter is not bindingly regulated

between them due to the formal objection. Of course, the objection may be withdrawn. However there may be some unwelcome consequences when settling any legal dispute that has arisen before the withdrawal entered into force.³¹

Confronted states have expressed their dislike of generally formulated statements which refer to the constitution or national legislation. A recent example is the reactions by six states to the Guatemalan statement concerning the 1951 Refugees Convention.³² Conventions of the Council of Europe may contain an obligation for reserving states to provide a brief statement as to what extent national legislation conflicts with the treaty commitments. In the *Temeltasch* case the European Commission of Human Rights had to decide to what extent article 64(2) of the European Convention on Human Rights contained an absolute condition, invalidating a reservation which was not followed by a brief statement of the laws concerned. The Commission found that the obligation was not peremptory, and that a reservation not indicating the content of conflicting national laws was nevertheless valid.³³ Switzerland argued that a federal state could not be asked to provide full information about the laws of member states.³⁴ It is however not an impossible task to enumerate the relevant legal provisions of the member states. A federal state will in any case have to face the task of finding out how far the laws of the member states are not in accordance with the treaty provisions. The information that has to be provided concerns the cases where state law conflicts with the convention. It is not necessarily so, that the law in all the member states is at variance with the treaty.³⁵ If the declaring state does not provide the relevant information on national laws, the other parties may rely on the *pacta sunt servanda* and the *bona fides* principles and assume the statement to be a declaration short of reservation until the declarant proves that national laws really conflict with the treaty and indicates to what extent the treaty norms are modified.³⁶

Even within a country there may be opposition to a statement that refer to constitutional provisions. When the Carter administration planned to ratify a number of human rights conventions there were proposals to insert in the instrument of ratification a statement clarifying that the conventions would only apply as far as they did not vary with the constitution and the laws of the United States (often referred to as a 'non self-executing clause').³⁷

27.3 THE CONSEQUENCES OF THE CHOICE BETWEEN A PLAIN DECLARATION AND A GENUINE RESERVATION

One will naturally think of the consequences when considering an interpretative declaration to be a simple or a qualified one; or a doubtful statement as a plain declaration or a proper reservation.

The consequences of considering a statement to be a reservation is that the rule of tacit acceptance applies. This rule goes much further in binding the confronted states than the general rules on acquiescence which govern the case of unilaterally presented interpretations.³⁸ A state which is confronted with a reservation has to accept the situation that silence on its part will make the

reservation opposable to it. It is therefore in the interest of the confronted states to have a statement considered as a simple declaration of interpretation, application or policy.

A state which only clarifies its view on the correct interpretation or application of a treaty may have to submit to the judgement of a court whereby its interpretation is found to be incorrect. Any action in accordance with the declared interpretation is hence judged to be a breach of the treaty. It may be in the interest of the declarant to forestall such a situation, an interpretation construed as a reservation rules out liability. However this cannot always be assumed to be the ultimate intention of the declaring state.

The effects of a protest against a simple interpretative declaration and of an objection to a reservation are different. A protest against a unilateral interpretation has only the effect of showing that the scope of the norm is not definitely settled, but that the norm applies is beyond doubt. A dispute as to the application of the norms has to be settled according to the usual disputes settlement procedures. Once this is done the parties are bound to accept the clarification of the force and content of the norm.

An objection to a reservation will exclude the application of the treaty norms to the extent of the reservation. The treaty will operate only on a limited scale. The desire to secure the integral operation of a treaty would speak in favour of construing a doubtful statement as a declaration.

Usually there is no difficulty in deciding whether or not a statement is an interpretation or an 'excluding reservation'. Views may diverge when a statement in a general way asserts the prevalence of national law over the treaty, or where there is uncertainty as to whether the provision contains an obligation or a recommendation. A number of statements to the Refugees Convention hold that certain provisions contain only recommendations but no obligations.³⁹ A formal objection to such a statement would exclude the relevant norms from applying in the mutual relations between declaring and reacting state. A simple protest against such a statement understood as an interpretation leaves the provision still applicable.

In the case of 'modifying reservations' the situation is more complex. The traditional view has been that the whole norm which has been modified is excluded from operating once an objection has been made.⁴⁰ As early as the Vienna Conference there were doubts as to the meaning of the expression that "provisions to which the reservation relates do not apply to the extent of the reservation". When the chairman of the Drafting Committee, Yasseen, explained that if a reservation affects only some of the paragraphs of an article, an objection would only prevent these paragraphs from applying, it still left a number of questions unanswered.⁴¹ Yasseen did not seem to have made a distinction between a provision (paragraph) as a norm formulation and the norm itself. Was he aware of the fact that a paragraph may contain an independent norm, or an exception to a norm introduced in a preceding paragraph? Is it correct that an objection to a reservation denying an exception has the limited effect proposed by Yasseen?⁴²

There are reasons to believe that reservations may have effects which go beyond the very provisions which they identify. Where a reservation which relates only to one provision is held to be incompatible it affects the treaty

norms as a whole or a major part of them and cannot, therefore be permitted. Some contracting states considered that the Syrian and the Tunisian reservations to the provisions on disputes settlement in the Vienna Convention did affect the whole of part V concerning invalidity and termination of treaties. Their objections therefore excluded all the provisions of part V from applying with respect to the reserving states.

The Swedish government for example considered that:

"... these provisions regarding the settlement of disputes are an important part of the Convention and that they *cannot be separated from the substantive rules* with which they are connected. Consequently, the Swedish Government considers it necessary to raise objections to any reservation which is made by another State and whose aim is to exclude the application, wholly or in part, of the provisions regarding the settlement of disputes. While not objecting to the entry into force of the Convention between Sweden and such a State, the Swedish Government considers that their treaty relations will not include either the procedural provision in respect of which a reservation has been made or the substantive provisions to which that procedural provision relates." (emphasis added)⁴³

Both France and the UK contended in the *Anglo-French Continental Shelf* arbitration that the statement and objections also affected other norms than the one specified in article 6. France's contention was that the UK objections had effects which extended beyond the provision indicated by the reservation. On the first hand, the whole of the Continental Shelf Convention became inapplicable between France and the UK. France argued that the maximum effect rule was valid at the time of the French accession in 1964 and the UK reactions in 1966. Although the ILC at that time supported the maximum effect rule as applied within the OAS, the Court did not find that it had been adopted in general treaty law.⁴⁴ On the other hand, France considered that the whole of article 6 was inapplicable. This view was also rejected by the Court. The Court however erred in believing that the reservation clause in article 12 of the Convention provided guidance as to the effect of objections.⁴⁵ The United Kingdom again held that the French statement affected the application of articles 3 and 4 of the Territorial Sea Convention and article 1 of the Continental Shelf Convention. Because of these extensive effects of the French statement it was in conflict with international customary law respectively the prohibition against reservations under article 12 of the Continental Shelf Convention. The French reservations were therefore considered invalid.⁴⁶ The Court did not concur in this opinion. That the idea of reservations affecting other treaties is not easily avowed is proven by the *Nuclear Tests* case.⁴⁷

The Court of Arbitration attached a limited effect to the French reservations and the UK reaction. The Court tried to determine the actual width of the disagreement between France and the UK. Its task was to find out what could reasonably be construed as an agreement between France and the UK as to their disagreement.⁴⁸ The UK wished that the entire Convention should apply. France declared that the equidistance method should not be used in those areas which it had specified in its statement. This means that France was certainly not opposed to the application of article 6 in other regions. France

had only enlarged the list of exceptions to the use of the equidistance method. The delimitation regime under article 6 can be reformulated as follows:

- (1) If there is no special agreement
- and
- (2) if there are no special circumstances present
- then
- the equidistance principle will apply

The French statement modified the delimitation regime in the following way:

- (1) If there is no special agreement
- and
- (2) if there are no special circumstances present (it being understood that there are special circumstances in the Bay of Granville ...)
- and
- (3) if there are no baselines established after 29.4.1958 in the area
- and
- (4) if the area does not lie beyond the 200-metre isobath
- then
- the equidistance principle will apply

The UK disapproval has the effect of questioning the exemptions from the application of the equidistance principle under 3 and 4. This means that in the areas specified in 3 and 4 the equidistance method is under dispute. The question was also, if the indication of those areas where special circumstances exist and the disapproval thereof prevented the rest of the delimitation regime from applying. The Court held that this was not the case. Only in the specified areas could the delimitation not be effected on the basis of the Continental Shelf Convention. In other areas article 6 remained still in force.

The equidistance method together with the special circumstances criterion formed a single rule.⁴⁹ Without the equidistance method the special circumstances condition was meaningless. Without the special circumstances condition the equidistance method was impracticable.

However limited the effects of an objection may be considered, the result will nevertheless be that treaty norms will not apply but partially or under certain conditions. Any adjudicating organ will therefore be obliged to undertake the burdensome task of establishing a rule of international custom. In the *Anglo-French Continental Shelf* arbitration the Court had to discuss the following questions:

- (a) The effect of the French statement as far as it concerns the special circumstances criterion
- (b) The intentions of the French government at the time it communicated its statement
- (c) The intentions of the UK government at the time it notified its disapproval
- (d) The combined effects of the French statement and the UK disapproval on the norms of the convention
- (e) The existence of any customary norm regulating the delimitation of continental shelves

One may wonder if it was really necessary to make the detour via the establishment of a norm of international custom. The Court would have been spared a lot of subtle argumentation had it construed the French statement regarding the special circumstances condition as a plain declaration of interpretation. Article 6 would have applied and the result would have been much the same.⁵⁰ It is not certain that the equidistance method has a stronger impact under article 6 than under international customary law as has been contended.⁵¹ Both article 6 and the customary rules on delimitation have the same goal, to guarantee an equitable delimitation. The equidistance principle in the Convention is given a limited role once the special circumstances condition is understood in broad terms. As mentioned above the French statement, as far as it concerned the special circumstances criterion, should not have been considered as a reservation as it was not possible to show how it modified article 6.⁵²

That a state may find it difficult to choose between a declaration and a reservation is proven by the US ratification of the 1925 Gas Protocol. The estimation of the possible repercussions of a declaration or a reservation influenced the final choice. In 1970 President Nixon transmitted the Protocol to the Senate for advice and consent.⁵³ The US government wanted to maintain its view that the Gas Protocol did not prohibit lachrymatory gases or herbicides. The question arose as to how the US should safeguard its position. Most of the parties considered the Protocol to prohibit the use of tear gas.⁵⁴ This view had however not been authoritatively established as the correct one. The choice for the US was, *inter alia*, between an informal understanding, a formal interpretative declaration and a reservation.⁵⁵ An informal understanding would not be transmitted to the French government, being the depositary of the protocol, and therefore not communicated to the other parties. The other parties would have no opportunity to protest the US interpretation, but neither could the US invoke any approval by acquiescence. A plain interpretative declaration would be notified to the other parties which would possibly protest against the declaration. Neither the informal understanding nor the formal declaration would protect the US against charges of violations of the Protocol when using tear gas. The US would run the risk that its use of tear gas will be condemned as a breach of the Protocol, thereby paving the way for retaliation and escalation.⁵⁶ An anticipated reservation would protect against charges of treaty violation, but the chances that it may be objected to are great. The objecting state could argue that no treaty relations exist between it and the US. Even a simple objection may have far-reaching effects. Because the material obligations are comprised within one single provision the whole Protocol could easily become inapplicable. Even in the case where one would assume that the objection does not exclude the whole provision from applying, it may be difficult to decide if the reserving state had used gas in violation of the treaty or not. The very criticism against the efforts to present a reservation concerning tear gas, contended that it was not easy to decide when a gas was a harmless riot-control agent and when it was asphyxiating and thus prohibited. Another party could always contend that the gas was of the latter kind. The first use of gas may induce the other belligerent parties to use similar or other kinds of gases and this would be the first step to escalation. The United

States finally ratified the Geneva Gas Protocol without any statement concerning tear gas or herbicides. This example shows that both a declaration and a reservation may have negative effects which force a consenting state to abandon the idea of formulating any kind of statement.⁵⁷

27.4 PROPOSALS DE LEGE FERENDA

The question of determining the nature of a statement is one of the very fundamental problems in reservation law. It is quite probable that this problem will be at the very heart of many future disputes. Hopefully, the various aspects of this question will be analyzed and clarified in future adjudications. For the time being this part of the reservation regime remains indefinite.

From the viewpoint of the operation of the treaty, and in the interest of the confronted states, a statement is preferably construed as a simple declaration. From the view of the declaring state it may occasionally be safer to let the statement operate as a reservation. If a state is not ready to abandon its interpretation, it is in the interest of all that such a statement is unequivocally qualified as an 'anticipated reservation' which makes the reservation regime enter into force once it has been established that the interpretation is actually incorrect.

A formula which may be recommended is the one used by Netherlands on ratifying the Covenant on Civil and Political Rights in 1978. The Netherlands government was not sure if its domestic legislation conformed to the provisions of the Covenant. In an explanation attached to this statement the Netherlands declared that it preferred to call all parts of its statement "reservations" even if some parts appeared to be interpretative in nature. Thus the statement must be considered to contain normal reservations and qualified interpretative declarations which were latent reservations. The explanation leaves no doubts as to the intentions of the Netherlands government:

"The Kingdom of the Netherlands clarify that although the reservations [...] are partly of an interpretational nature, [it] has preferred reservations to interpretational declarations in all cases, since if the latter form were used doubt might arise concerning whether the text of the Covenant allows for the interpretation put upon it. By using the reservation-form the Kingdom of the Netherlands *wishes to ensure in all cases* that the relevant obligations arising out of the Covenant *will not apply* to the Kingdom, or will apply only in the way indicated." (emphasis added)⁵⁸

A confronted state which is not sure about the nature of a statement may resolve the problem by 'reserving its position'. This will inform the declaring state that one is not able to take a stand in the question before the implications of the statement are known. Canada preferred to couch its reaction to the French statement to article 6 of the Continental Shelf Convention concerning the special circumstances condition in such cautious terms as did the Netherlands with respect to the Venezuelan statement of a similar content.⁵⁹ Once the nature and scope of a statement has been ascertained the reacting state may

specify the effects it wants to give its "reserve".⁶⁰ Such reactions may be construed as 'potential' or 'anticipated' objections. Once the statement proves to be a true reservation, the precautionary reaction turns into a formal objection. It is however submitted that before the nature of a doubtful statement is ascertained there is no obligation to react to avoid the implications of the tacit acceptance rule which only relate to reservations.

PART THREE

CHAPTER 28

FUNCTIONS OF THE DEPOSITARIES WITH REGARD TO RESERVATIONS AND DECLARATIONS TO TREATIES DEPOSITED WITH THEM

The depositary may be a government, usually of the country where the convention has been signed.¹ It may also be the secretariat of an international organization under whose auspices the treaty had been elaborated and concluded. The depositary has the competence and duty to "administer" the treaty by taking it in custody, examining the correctness of, and registering all instruments relating to it, communicating relevant information to the interested states and organizations, and affecting the registration of the treaty and the related instruments. The Vienna Convention mentions the following functions of the depositary:²

(a) Functions of custody

The depositary receives and keeps in custody the original text of the treaty, the full powers, signatures, instruments of ratification, acceptance, approval and accession.

(b) Functions of examination

The depositary examines if the full powers, other instruments, notifications and communications are in due and proper form and where this is not the case draws the attention of the respective state to the matter.

(c) Functions of information

Parties and states entitled to become parties to the treaty are to be informed of any acts relating to the entry into force and operation of the treaty. The states entitled to become parties to the treaty have to be informed of the date when the necessary number of signatures or instruments of ratification, etc., for the entry into force of the treaty has been obtained.

(d) Functions of registration

It is incumbent on the depositary to undertake the necessary acts to register the treaty in accordance with article 102 of the UN Charter with the Secretariat of the United Nations.³

28.1 THE DEPOSITARY PRACTICE OF THE LEAGUE OF NATIONS SECRETARIAT AND THE UNITED NATIONS GENERAL-SECRETARIAT PRIOR TO 1952

During the era of the unanimity rule the Secretary-General of the League of Nations and the United Nations were faced with the task of inquiring about the views of the interested states on the reservations that had been formulated to the treaty. If the reservation had been objected to, the instrument of ratification or accession could not be received for deposit. The

Secretary-General felt it necessary at an early stage to introduce a consistent procedure for determining when a reservation had been accepted. This was required in order to proceed to the final deposit of the instrument to which the reservation had been affixed; the Secretary-General had to face the fact that states as a rule do not indicate their views on reservations. The problem was to determine which states could be considered to have an interest in the treaty and thus a right to express their views on reservations.⁴ The Secretary-General settled for differing solutions, in the case where the treaty had not yet entered into force when he was faced with a reservation, and in the case where the treaty was already in force.

(a) In the first case the Secretary-General would ask the interested states to notify their possible objections prior to a certain date, usually the day when the treaty was to enter into force. If the objections had not been received before that date, it was his understanding that the states notified had accepted the reservation.⁵ When a state had ratified or acceded subsequent to the notification of the reservation without any express objection, this was construed as a tacit acceptance of the reservation.

(b) In the case where the treaty had already entered into force the procedure was similar, except that the interested states were assumed to have accepted the reservation after a "reasonable" time.⁶ It is not clear what the Secretary-General understood by "reasonable".

By following this procedure the Secretary-General considered himself as simply following the practice of the League of Nations Secretariat.⁷

Prior to the case of the reservations to the Genocide Convention the UN Secretary-General had not faced a situation where reservations had been met with objections. However, he adopted the views as reflected in the practice of depositary governments.⁸ An instrument of ratification could not be received if a reservation accompanying the instrument was objected to and not abandoned or altered. In connection with the dispute on the reservations to the Genocide Convention he admitted though that there was some uncertainty as to the *effects* of an objection. The uncertainty in question was apparently whether the objection vitiates only the reservation leaving the instrument of consent effective or the whole instrument debarring the reserving state altogether from participation in the treaty.⁹

As a result of the deliberations in the UN General Assembly and its VIth Committee during which the unanimity rule was for the first time seriously questioned, resolution 598(VI) was adopted circumscribing the depositary functions of the Secretary-General. The function of the Secretary-General was to be purely administrative and technical without prejudicing in any way the question of legal effects of reservations or declarations.¹⁰ According to this resolution the Secretary-General was required to fulfil his functions as depositary in respect of future treaties "without passing on the legal effect of such documents" (containing reservations or objections). He was further asked "to communicate the text of such documents relating to reservations and objections to all States concerned leaving it to each State to draw the legal consequences from such communications."

When he subsequently in 1959 on receipt of the Indian instrument of accession containing a number of "conditions" asked for the view of the IMCO Assembly on the Indian statement, he was requested to circulate the document to all members of the organization. Until these states had had the opportunity to express their views, India would be allowed to participate in the proceedings of the IMCO Assembly without vote.¹¹ The action taken by the Secretary-General was considered as not contradicting the resolution from 1952 as it only concerned treaties "concluded" after 12 January 1952. The IMCO Convention had been adopted on 6 March 1948.¹² The General Assembly thought it wise after this incident to extend the rules and principles enumerated in resolution 598(VI) even to earlier treaties.¹³ According to the new resolution 1452(XIV) the principles of the 1952 resolution were to apply to all treaties concluded under the auspices of the United Nations which do not contain provisions to the contrary.

28.2 THE PRESENT PRACTICE OF THE SECRETARY-GENERAL OF THE UNITED NATIONS

Since 1959 the General Assembly has not passed any new resolution on the functions of the Secretary-General. The principles of the 1952 and 1959 resolutions still guide the Secretary-General. This means that in performing his depositary functions he will follow:

- (a) the clauses of each treaty where such exist in the matter,
- (b) the decisions of the parties concerned and failing these,
- (c) the instructions of the General Assembly, i.e., resolutions 598(VI) and 1452(XIV).

In all those cases where the treaties which are deposited with the UN Secretary-General lack reservation clauses and *ad hoc* agreements between the parties on the depositary functions are knowingly non-existent, the Secretary-General has strived to follow a prudent practice avoiding any steps which could be considered as conflicting with the principles laid down in the resolutions of the General Assembly of 1952 and 1959.¹⁴ He receives as a rule all signatures, instruments of ratification, acceptance and approval and accession containing any kind of statements, and notifies the text to all states interested in the matter.¹⁵ Likewise he receives any formal reaction to such statements and communicates them to both the declaring state and the other states concerned. He is not allowed to pass any judgement on a statement and has to refrain from analyzing them in order to determine if they are proper reservations or only declarations short of reservation. These statements are listed under the same heading "Reservations and Declarations" in the official compilation of the multilateral treaties of which he is depositary and which is published in the name of the United Nations. During the era of the unanimity rule the Secretary-General had to determine whether a statement was a reservation or a declaration before deciding the further procedure he was going to follow.¹⁶ Establishing the unanimous acceptance of a statement was only

necessary with regard to proper reservations. In the first place he would rely on the designation of the declaring state, but he was not obliged to do so and was free to adopt a solution that would offer the best safeguards to all parties.

After the adoption of resolutions 598(VI) and 1452(XIV) the Secretary-General of the United Nations has been eager to avoid measures that would somehow prejudice the question of the legal effects of reservations, declarations and objections.¹⁷ This also concerns the case when there are doubts whether a statement is a reservation or a declaration. In connection with certain categories of questions the limits of the competence of the Secretary-General have been tested.

28.2.1 Determining the date of entry into force of a treaty

From time to time the Secretary-General has been faced with the problem of how reservations affect the entry into force of a treaty. He has had to decide if an instrument of ratification subject to a statement was to be included in the number of instruments that were to bring the treaty into force. This problem does not arise where the reservations have been formulated and accepted in connection with the adoption and signing of the treaty, which for example was the case at the UN Conference on Customs Formalities for the Temporary Importation of Private Road Motor Vehicles and for Tourism.¹⁸ In such a case the Secretary-General receives for deposit all instruments of ratification accompanied by reservations that had already been included in the Final Act of the Conference. However, if a state not listed in the Final Act presents a reservation not explicitly authorized, whether identical with one already inserted in the Final Act or not, such a reservation would have to follow the ordinary procedures for consulting the views of the confronted states.¹⁹

As a general rule the fact that an instrument of ratification is accompanied by a reservation does not hinder the deposit of that instrument.²⁰ Neither does a reservation as such result in the impossibility of counting the relevant instrument of ratification among those which are required for the entry into force of a treaty. This can be derived from the very wording of the two General Assembly resolutions.²¹ It is also in accordance with the Vienna Convention regime on reservations. According to article 20(4)(b) an objection will as a rule not obstruct the entry into force of the treaty as between reserving and objecting state and therefore the instrument to which the reservation is attached cannot be considered as ineffective and thus unqualified for deposit. Owing to the theoretical possibility that a reservation may be null and void as well as invalidating the instrument of ratification or accession, the Secretary-General has followed the practice to ask all the interested states to inform him whether they approve of the procedure that he counts the instruments of ratification and accession which are accompanied by reservations among the number which is needed to make the treaty enter into force. The interested states are given a period of 90 days to oppose such action. If after the delay of 90 days from the request none of the consulted states has expressed their opposition, the Secretary-General will announce the entry into force of the treaty on the basis of all instruments of consent, with or without reservations, according to the provisions of the treaty.²²

This procedure is said not to affect the relations between the reserving state and the other states in the sense that the latter remain free to object to any reservation, excluding the parts directly concerned or the whole of the treaty from applying between them. However, in certain ways a consulted state may be bound by its inaction with regard to the request by the Secretary-General. If a state does not oppose the including of an instrument accompanied by reservation in the number required to make the treaty enter into force, there will be a presumption that such a state does not consider the reservation to be incompatible with the object and purpose of the treaty. When a confronted state considers a reservation incompatible it signifies according to the view expressed by the Secretary-General, that the instrument of consent could be held to be ineffective if the reservation was not abandoned.²³ Even if this view would be theoretically correct, it may in practice be difficult to advocate it against the other participating states. However, it will be sufficient for our example that at least the disapproving state is presumed to hold this view. If a dispute as to the incompatibility of a reservation would arise on some later occasion, a confronted state may find it difficult to argue that it had not acquiesced in the compatibility of a reservation although accepting the inclusion of the respective instrument in the number of ratifications and accessions that were needed to make the treaty enter into force.

If a consulted state was to express its opposition, the Secretary-General would not be able to count the instrument accompanied by the reservation.²⁴ This may be the case when a confronted state finds a reservation completely condemnable and cannot tolerate that such a state is considered a party.

It is important to remark that the Secretary-General resorts to the consultation procedure only in the two following cases:

- (a) If the ultimate instrument of ratification or accession, which according to the final clauses of the treaty will bring it into force (immediately or at the expiry of a certain delay, usually 30 days) is followed by a reservation.
- (b) If any instrument prior to the one which will bring ratifications or accessions to the required number, is accompanied by a reservation and this reservation has already been objected to at an earlier date.²⁵

If in the first case the Secretary-General observes that there has been no opposition within the consultation period of 90 days, he will inform each of the contracting states the date on which the treaty has entered into force for them.

In the second case, the Secretary-General will in the absence of any opposition to this procedure, send the notification of the date of entry into force to each of the contracting states except the state whose reservation had been objected to earlier. The Secretary-General thus avoided taking a stand as to the position of the reserving state. For him it remained an open question whether the reserving state had become a party to the treaty and on which date the treaty had entered into force for that state. The reason why the Secretary-General considered himself as not competent to determine whether a treaty had entered into force for the state whose reservation had been objected to,

was the above-mentioned theoretical possibility that all the confronted states would object to the reservation precluding the treaty from applying altogether with respect to the reserving state. In such a situation the instrument accompanied by the reservation would be accepted for deposit, but the treaty would have no legal effects whatsoever for the reserving state.²⁶ The circular letter by the Secretary-General announcing the deposit of such an instrument did not indicate any date of entry into force of the treaty for the reserving state.²⁷

Since 1976 the practice has been to indicate the moment of entry into force for the reserving state, but underlining the fact that it was up to each party to draw the legal consequences it may see fit to attach to the reservation.²⁸

There have been various occasions when the United Nations Secretary-General had to apply the consultation procedure. This apparently occurred for the first time in connection with the entry into force of the Geneva Convention on the High Seas.²⁹ The Bulgarian instrument of ratification was deposited on 31 August 1962 and it contained a reservation to article 9 of the Convention. A number of prior instruments of consent had also been accompanied by reservations, some of them objected to. The Secretary-General then asked all the interested states by circular letter to inform him if they could agree that he would count all the 22 instruments hitherto received (with and without reservations or declarations) among the number that was needed to make the Convention enter into force.³⁰ As no opposition had been declared within 90 days from the date of his communication the Secretary-General was able to notify in December 1962 that the Convention had entered into force as from 30 September 1962, i.e., on the 30th day from the date of deposit of the Bulgarian instrument of ratification.³¹

Another example is provided by the 1966 International Convention on the Elimination of All Forms of Racial Discrimination. Poland's instrument of ratification was the 27th instrument the Secretary-General had received and would have been the one that according to article 19 of the Convention would have brought it into force after the expiry of 30 days. The Polish instrument did contain a statement which, *inter alia*, excluded the compulsory jurisdiction of the ICJ under article 22.³² Some other states had also formulated reservations and with regard to two of them, the statements of Kuwait and Spain, the 90-day period for objecting to reservations under article 20(1) had not yet expired when the Polish instrument was received for deposit.³³ A few days before the Polish instrument was received the Secretary-General had received the instrument of ratification by India also comprising a reservation to article 22. It had not yet been notified to the other states at the moment the Polish instrument of ratification and reservation was received. The Secretary-General therefore communicated to the interested states that he was not able to determine the legal status of the four instruments before the respective expiry of the period of time mentioned in article 20. Article 20 says that the Secretary-General shall circulate to all states which are or may become parties to the Convention reservations formulated at the time of ratification or accession. A state which wants to object to the reservation shall do so within 90 days from the date of the communication by the Secretary-General. In his notification of 17 March 1969 he informed the interested states that the Con-

vention in accordance with article 19(1) had entered into force on 4 January 1969 on the 30th day after the date of deposit of the Polish instrument of ratification. He also informed that only one state, Pakistan, had objected to the reservation formulated by India.³⁴ This objection had apparently no impact on counting the Indian instrument among those that would bring the Convention into force. The Secretary-General was in this case not applying his 90-day consultation procedure, but article 20 of the Convention concerning reservations and objections to the Convention. The reservation clause also happened to fix the period of passivity for the construction of tacit acceptance at 90 days.³⁵

With regard to the 1966 Covenant on Economic, Social and Cultural Rights, Jamaica deposited on 3 October 1975 its instrument of ratification. It was the 35th instrument which according to article 27(1) was the one to bring the Covenant into force three months after the date of deposit. As the Covenant did not contain any reservation clause the Secretary-General applied his consultation procedure. Several of the 35 instruments were accompanied by reservations or declarations among which three drew disapprovals from a signatory state.³⁶ As it could be established after the expiry of 90 days that no state had opposed the counting of the instrument subject to reservations or declarations for the purpose of determining the 'general' entry into force of the Covenant which was declared to be on 3 January 1976.³⁷

A recent case is provided by the Vienna Convention itself. On 28 December 1979 Togo acceded to the Convention bringing the number of instruments deposited with the UN Secretary-General to 35, which according to article 84(1) of the Convention was the number needed to make the Convention enter into force on the 30th day from the date of deposit of the last instrument. As one of the reservations and declarations to the Convention had been formally disapproved of, the Secretary-General proceeded to his consultation procedure. In a circular letter dated 28 March 1980, that is 90 days after the interested states had been requested to indicate if they were opposed to counting all the deposited instruments for determining the date of entry into force, the Secretary-General could, as there had been no opposition to this, state that the Convention has to be considered as in force since 27 January 1980.

One comes to the conclusion that in none of the cases has there been any opposition to the procedure by the Secretary-General, not even where a prior reservation had been objected to as being incompatible.³⁸

28.2.2 Treaties of special interest to the United Nations

The Secretary-General of the United Nations may in certain cases act in a double capacity. He may combine with the functions of depositary of a treaty, his functions as principle executive organ of the United Nations. This is clearly recognizable with regard to the Conventions on the Privileges and Immunities of the United Nations respectively of the Specialized Agencies. He has some specific functions which are set out in the provisions of the Conventions. According to section 36 of the UN Privileges Convention he may conclude with any member states supplementary agreements adjusting the provisions of the

convention as far as that member is concerned. These two Conventions are not only multilateral treaties of the traditional kind, but they also constitute a series of bilateral commitments between the international organization and each individual member state. A similar provision is found in article 44 of the Convention on Specialized Agencies.³⁹ Specialized Agencies are not mere passive beneficiaries of the Convention but take an active part in fulfilling its own purposes and aims.⁴⁰ With regard to reservations and declarations to these Conventions the Secretary-General has followed the practice of notifying such statements to the executive heads of the specialized agencies. Where there was opposition within the specialized agency, the matter was examined by the Preparatory Committee of the Administrative Committee on Coordination. The Secretary-General, in his role as co-ordinator of the activities of the United Nations and the specialized agencies, was requested to communicate with the declaring state in order to arrive at a solution that was acceptable to both the specialized agency as well as the member state concerned. The result was usually that the declaring state abandoned its statement be it reservation or declaration.⁴¹

So, for example, Egypt presented a statement regarding section 7 of the Specialized Agencies Convention concerning the transfer of gold, and section 12 concerning the use of code and the diplomatic pouch. The Egyptian government finally abandoned its reservation on 27 September 1954.⁴² On acceding to the Convention on 20 July 1950 Austria declared that he would accord the privileges and immunities under the Convention to the extent which these are granted in Austria to members of diplomatic missions in accordance with general principles of international law. The statement was abandoned on 21 January 1955.⁴³ In its instrument of accession of 17 November 1954 the FRG made a statement excluding section 7(b) concerning the free transfer of funds, gold and currency.⁴⁴ The reservation was abandoned before the Secretary-General received the instrument of accession for definitive deposit. Belgium had made a colonial declaration stating that it would apply the Convention solely in its metropolitan territory. A joint representation on behalf of the specialized agencies was made in order to make the Belgian government have the Convention to apply to its dependent territories. Belgium abandoned its statement on 14 March 1962 and the instrument of accession was received for registration and deposit.

In 1963 a state wished to accede to the UN Privileges Convention and the Specialized Agencies Convention with the statement that article IV section 15 on representatives of member states was to apply to officials mentioned under article V and experts on mission mentioned under article VI. Section 15 of the Convention on the Privileges and Immunities of the United Nations reads:

The provisions of sections 11, 12 and 13 are not applicable as between the representative and the authorities of the State of which he is a national or of which he is or has been the representative.

The Secretary-General construed the reservation to be incompatible with the United Nations Charter and urged the declaring state to accede to the Convention without the reservation "so as to avoid the necessity of placing the

question before the General Assembly".⁴⁵ Subsequently a similar reservation was entered into by another state. The acceding state was not ready to accord full privileges and immunities to officials and experts being nationals or residents of the reserving state but only such limited privileges and immunities as would enable them to carry out their work efficiently.⁴⁶ The Secretary-General stated that it was not possible for him to find out which privileges and immunities the acceding state was in fact willing to accord. Although the terms of the statement were "vague and general" he understood them to derogate from the provisions of article 105 of the UN Charter being therefore incompatible with the latter. In both cases the reservation was abandoned.

28.2.3 Organizational treaties

With regard to organizational treaties containing the constitutions of international organizations the practice has crystallized to refer any statement in connection with the definite consent to be bound by the treaty, to the competent organ of the organization. Article 20(3) of the Vienna Convention simply codifies an established practice.

The United States' "understanding" with regard to the Constitution of the World Health Organization concerning the right of withdrawal was referred by the UN Secretary-General to the WHO, where the Assembly approved of the understanding.⁴⁷ Statements of the Union of South Africa and of Southern Rhodesia concerning certain provisions of the General Agreement on Tariffs and Trade were referred by the Secretary-General to the Meeting of the Contracting Parties where the statements were discussed and accepted at the 1st respectively 2nd Session.⁴⁸

In the well-known case of the Indian statement to the IMCO Constitution the procedure was similar. However, here India's dissatisfaction with the procedure of the Secretary-General led to the adoption of UNGA resolution 1452(XIV) limiting his depositary competence. It would seem that the Secretary-General with respect to the Cambodian and Indonesian statements, which were identical to the Indian one, followed a more cautious line, receiving and communicating the reactions of certain states to these statements. As to the latest statements of similar content, that of Malaysia of 17 June 1971 and of Sri Lanka of 6 April 1972, the Secretary-General pursued once again a more active line. As the wording of these statements was admittedly obscure the Secretary-General asked for a clarification before proceeding with the deposit of the two instruments of acceptance. He described the history behind the Indian statement and the solution the problem had received in the UN General Assembly and the IMCO Council and indicated that he "would appreciate it if the respective government would clarify its position regarding the declarations contained therein, in the sense that they have been intended as declarations of policy and do not constitute a reservation".⁴⁹ Such a clarification was received from Malaysia on 3 June 1971 "obviating the necessity" for the Secretary-General to refer the question to the IMCO for its consideration.⁵⁰ This permitted him also to receive the Malaysian instrument of acceptance for definite deposit on 17 June 1971. When producing her statement Sri Lanka

declared upon deposit of her instrument of acceptance in a similarly formulated note that her statement did not constitute a reservation.⁵¹ The Secretary-General thus actively "guided" Malaysia and Sri Lanka to specify the nature of their statements in a way that would facilitate the deposit of their statements.

A more recent case is the Australian statement from 12 April 1982 concerning the Constitution of the United Nations Industrial Development Organization.⁵² The Secretary-General requested the Australian government to clarify its statement indicating whether it constituted a reservation or not. In a *note verbale* dated 12 July 1982 and received on the same day by the Secretary-General, the permanent mission of Australia could inform that the Australian government shared the view of the Secretary-General that the statement did not purport to constitute a reservation in respect of any provisions of the UNIDO Constitution. Taking into account the provisions of article 22 of the Constitution regarding its interpretation and application, the Secretary-General considered the statement to be an interpretative declaration and declared the effective date of the deposit to be 12 July 1982.⁵³

28.2.4 The depositary functions of the UN Secretary-General with regard to conventions concluded under the auspices of the League of Nations

The Secretary-General of the United Nations had until the conflict concerning reservations and declarations to the Genocide Convention considered the unanimity rule to be a binding rule under international law and had continued the depositary practices of the Secretariat of the League of Nations with respect to instruments that were accompanied by reservations or obscure statements. He would not receive for deposit any instrument of consent subject to a reservation before he was able to prove the acceptance. In the case where the reservation was objected to the Secretary-General would first ask the reserving state to abandon its reservation. If it was not ready to do so, he could not accept the respective instrument of ratification or accession for deposit.⁵⁴ After the UN General Assembly had passed its resolutions on the depositary functions in 1952 and 1959 the Secretary-General had to change his practice.

The two resolutions did not apply to the conventions concluded under the auspices of the League of Nations. The UN General Assembly had by its resolution 4(I) asked the Secretary-General to function as depositary even for those conventions the depositary functions of which had been entrusted to the League Secretariat. At the 14th session of the General Assembly there was a proposal to the effect that the new practice under the two UNGA resolutions was also to apply to the League of Nations conventions. It was not successful.⁵⁵

On four occasions the Secretary-General has been faced with the question of whether he was to apply his old practice. The first time this occurred in connection with the receipt on 4 November 1971 of the instrument of accession by Bulgaria containing a statement to the 1936 Convention Concerning the Use of Broadcasting in the Cause of Peace.⁵⁶ It was evident that resolutions 598(VI) and 1452(XIV) were inapplicable. The convention did not contain a

reservation clause that would have provided any guidelines. The Secretary-General understood the situation to be such that without new instructions from the General Assembly he would not be able to apply for the first time a procedure different from that of the League Secretariat with regard to conventions that had been concluded under the auspices of the League. If he intended to do this, he was certain to encounter serious protests by a number of member states.⁵⁷ Thus he applied the older practice and did not accept the Bulgarian instrument for deposit before he had consulted the states concerned. He asked these states to communicate to him within the usual period of 90 days whether they opposed the deposit of the instrument. If there was no opposition to this he would accept the Bulgarian instrument for deposit, which would then take effect 60 days after the date according to article 12 of the Convention. The United Kingdom in a note of 12 May 1972 declared that it was unable to accept the first part of the Bulgarian statement containing a reservation to article 7 of the Convention providing for compulsory jurisdiction, and a declaration relating to non-recognized states. However, the United Kingdom declared that her "objections" would not preclude the entry into force of the Convention for Bulgaria.⁵⁸ The Secretary-General was thus saved from facing the full consequences of the unanimity rule and the former practice of the League Secretariat. The Bulgarian instrument of accession with the accompanying statement was finally accepted for deposit on 17 May 1972. The formulation chosen by the United Kingdom in its formal reaction hindered the occurrence of a major dispute. Had the objection not been specified in the above-mentioned way, the Secretary-General would have had to disregard the Bulgarian instrument of accession in order to be consistent.⁵⁹ This would undoubtedly have met with protests from Bulgaria and other socialist countries which used to make similar statements. The only solution then would have been to refer the matter for consideration to the General Assembly which would have had to achieve some kind of compromise settlement. Statements identical with the Bulgarian one were made by the USSR on ratification in 1983 and the GDR and Hungary on accession in 1984. The United Kingdom reacted to these statements in exactly the same way as to the Bulgarian statement. The question of the application of the unanimity rule to League of Nations treaties now deposited with the UN Secretary-General may still arise in the future. However, the Secretary-General probably in close consultation with the states concerned will arrive at a solution similar to the one mentioned above, where the full implications of the unanimity rule may be avoided.⁶⁰

28.2.5. Treaties comprising reservation clauses

If a treaty contains reservation clauses or other clauses which have a relevance for the depositary procedures, the Secretary-General will abide by them. This is clearly envisaged in resolution 1452(XIV). The rule set out in the resolution will apply as far as the conventions concluded under the auspices of the United Nations "do not contain provisions to the contrary".⁶¹ If for example a treaty clearly prohibits certain reservations the Secretary-General

may not receive an instrument containing such a reservation for deposit if the reservation is not abandoned. The Secretary-General will have to inform the reserving state that he is unable to accept for deposit the instrument containing the reservation. He will not be obliged to notify the other interested states about the reservation. The deposit of the instrument may become possible when the state concerned declares that it will not maintain its reservation.⁶² Or the Secretary-General may ask the declaring state to clarify that the statement is in fact not intended to be a reservation. This may be a way out of the dilemma where a statement purports on the relation between a provision of the treaty with provisions in some other treaty or internal law.

As stated earlier, the 1965 Convention on Racial Discrimination contains a reservation clause in its article 20. Subparagraph 1 establishes a rule on acceptance of, and objections to reservations. Objections will have to be made within 90 days from notification of the reservation, otherwise the reservation is considered as tacitly accepted. Subparagraph 2 provides one of the rare examples where a treaty mentions the incompatibility of reservations.⁶³ Reservations which have the effect of inhibiting the operation of organs set up under the Convention (so-called inhibitive reservations) are assimilated with incompatible reservations. Reservations are considered incompatible or inhibitive if at least 2/3 of the states party to the treaty object to them.

As will be recollected the Secretary-General had a problem with determining the date of entry into force of the Convention due to the fact that the instruments of consent by Poland, India and other contracting states contained reservations and declarations. The Secretary-General referred to article 20(1) on objections and tacit acceptance when asking for the reactions by the interested states in order to be able to fix the date of entry into force. The single objection by Pakistan to the Indian reservation regarding the clause on judicial settlement of disputes did not hinder the counting of the Indian instrument among the required number of ratifications and accessions. Only in the case where two thirds of the "States Parties" had considered the reservation incompatible or inhibitive, would the reservation have been void and the instrument of accession invalid. As the required majority for determining the compatibility and thus the admissibility of a reservation has to be counted on the basis of states being party to the Convention, this can only be the case where the treaty had already entered into force. Theoretically it is possible that whereas at least one third of the contracting states at the moment the Secretary-General makes his request finds the reservation compatible, there may be less than one third of the parties sharing this view at the moment the treaty enters into force.

It may be asked why the provisions under article 20 concerning strictly the case of acceptance and objections to reservations were extended to the question of determining the entry into force of the Convention. It would have been more consistent to first apply the traditional consultation procedure in order to find out if all the instruments could be recognized for the determination of the date of entry into force of the Convention. When the date of entry into force has been officially established it will be possible to assert the fate of reservations and the indirect effects it may have on the instruments of final consent which they accompany. If by any chance there would suddenly be present

the majority needed to condemn a reservation as incompatible or inhibitive at the moment the treaty enters into force, the reservation is void and the instrument is invalidated, provided that the reservation is not abandoned. In practice this would hardly ever have happened. There was only one state objecting, Pakistan, of a possible 26 before the expiry of the 90-day period for objecting under article 20(1). The chances of a sudden influx of instruments of ratification and accession by states condemning the reservation after the receipt of the Polish instrument of ratification and before the date of entry into force is minimal. As at least 25 states (not comprising Poland) must be considered to have accepted the Polish reservation, over 50 objecting states would have been necessary to invalidate the Polish instrument.⁶⁴ If the number of ratifications and accessions for the entry into force had been lower, let us say 9 instruments, the danger may have been more real. When, for example, the ninth state to ratify does so subject to a reservation and five states object to it, the reservation could be held to be compatible and admissible if the required majority could be determined on the basis of the nine instruments from the contracting states. If there was shortly afterwards (let us say two to three weeks after the transmission of the 9th instrument) ratifications or accessions by three new states being hostile to the reservation, we would be in the strange situation where the instrument with the reservation may be counted in order to determine the entry into force of the treaty but where there is a sufficient majority among the "parties" to the operative treaty to invalidate the reservation and instrument of ratification that before had the effect of bringing the treaty into force.

Even if the chances for conflict as to the correct application of article 20 of the Racial Discrimination Convention are slight this will not be a satisfactory argument for applying article 20 for the determination of the entry into force of the Convention instead of the traditional consultation procedure. There is nothing in article 20 which would have the effect of excluding the normal procedure of the Secretary-General.⁶⁵ Formally seen, the application of the rule on the admissibility of reservations presupposes the treaty being in force, because the required majority is determined on the basis of the number of "parties" to the treaty. Those states that are party to the treaty can only be determined once the treaty is in operation.

The simplest procedure would undoubtedly be to count every instrument of ratification or accession among the number that is required to bring the treaty into force irrespective of the fact whether or not they comprise reservations or declarations. Only in those rare cases where a reservation is clearly and unequivocally prohibited by the treaty itself would an instrument containing such a reservation not be counted. In the case, for example, of the Convention on Racial Discrimination, where the treaty provided provisions to ascertain the incompatibility and inadmissibility of a reservation, this would not obstruct the counting of a reservation that possibly later could be declared to be inadmissible.⁶⁶

If it was later established through the procedure that the reservation is inadmissible, there are two solutions: either the reserving state withdraws its reservation or it does not. In the latter case it would be excluded from participation in the treaty.⁶⁷

Once a certain kind of reservation has been declared incompatible according to the procedures under the treaty, the Secretary-General would have to recognize this decision and not receive instruments in the future containing similar reservations.

28.2.6 The competence of the Secretary-General to determine the nature of a statement

The Secretary-General does not consider himself competent to receive an instrument of ratification or accession with a reservation that is not permitted under the treaty. If the contents of the statement are not clear he will have to clarify the matter in close consultation with the declaring state. He will ask the declaring state if the statement really intends to modify the application of the treaty.⁶⁸ He is however free to explore the substance of the matter and is not necessarily bound to accept the view of the declarant.⁶⁹ In doing this he will strive towards a solution which offers the greatest safeguards to all parties.⁷⁰ Frequently he has preferred to construe such statements as declarations of policy or interpretation.⁷¹ Where statements have concerned organizational treaties, the Secretary-General has worked actively to achieve clarity as to the nature of an imprecise statement. With respect to the Malaysian statement to the IMCO Constitution he indicated that he would appreciate the statement clarified as intended to be a declaration of policy.⁷² This was done in order to avoid the laborious procedure of referring the whole question to the IMCO Assembly where an identical statement by India had already been discussed back in 1959–1960.⁷³ A similar action was taken by the Secretary-General with respect to the statement by Australia to the UNIDO Constitution. In response to this request, the Australian government agreed to his view that the statement was not a reservation but actually an interpretative declaration. The Secretary-General was then able to proceed to the definite deposit of the Australian instrument of ratification.

The Secretary-General of the United Nations also used the opportunity to pronounce his views on the incompatibility of reservations. With regard to the statements presented to articles IV, V and VI of the Convention on the Privileges and Immunities of the United Nations he declared the statements not to be compatible with article 103 of the Charter of the United Nations. He did not explicitly state that it was incompatible with the aim and the purpose of the Convention itself, though this could be so in an indirect way.⁷⁴ Where reservations had been formulated to the Convention on the Privileges and Immunities of the Specialized Agencies it was up to these agencies and their Executive Heads to ponder on the compatibility of reservations. In order to co-ordinate the views on this question it was natural to refer the question for further consideration to the Administrative Committee on Co-ordination. The view has been generally quite restrictive towards reservations to the Specialized Agencies Convention, apparently they were considered to be incompatible. The result has been that the reservations have been abandoned pursuant to consultations between the Secretary-General and the reserving state.⁷⁵

28.2.7 Final comments on the practice of the UN Secretary-General

The Secretary-General of the United Nations has, since the dispute concerning his procedure with respect to the statements to the Genocide Convention and the statements to the IMCO Constitution, tried to follow a cautious line of action to avoid upsetting any of the interested states. He has as a rule followed a procedure which he believed would meet the approval of all the states concerned. He has assumed that the principle set out in resolutions 598(VI) and 1452(XIV) or the reservation clause of the relevant treaty is acceptable to all the interested states. Naturally, he will recognize any special agreement between all the parties concerned.⁷⁶

These sources may not provide sufficient guidance in certain cases, as for example the determination of entry into force of treaties where some instruments of ratification or accession are accompanied by reservations which are neither explicitly permitted nor explicitly prohibited. In such cases he has felt himself compelled to introduce the consultation procedure. This means that when the last instrument of consent required to make the treaty enter into force has been received and some instruments are accompanied by statements which have met with disapproval, the Secretary-General inquires if the interested states will accept that he counts all the instruments with or without these statements among the number which is, according to the final clauses, needed to make the treaty enter into force.⁷⁷ Where the interested states have not reacted within 90 days from receiving the request from the Secretary-General, it is construed by him as an acquiescence in the proposed action. This procedure is said to date back to 1962 when the Secretary-General had to decide upon which date the Geneva Convention on the High Seas had entered into force. The convention itself stipulated a 30 days delay for the final entry into force from the deposit of the last required instrument of ratification or accession.⁷⁸ This period was not considered as sufficiently long for the interested states to respond to the request by the Secretary-General, wherefore it was considered appropriate to choose a longer period.⁷⁹ The period of 90 days delay is encountered in a number of treaties having provisions on reservations and objections.⁸⁰ It was believed to be long enough for states to react on reservations and therefore it was certainly long enough for states to decide if an instrument subject to a reservation could be taken into account for settling the date of entry into force of the treaty.

The result of introducing the period of 90 days for consultation did in some cases create uncertainty for a certain period as to the actual date of entry into force of the treaty. This is notably the case where the treaty provides that it will enter into force earlier than 90 days from the receipt of the last instrument of consent. In such instances the Secretary-General may only retroactively announce the entry into force of the treaty. This was the case with the above-mentioned High Seas Convention where the treaty-based delay for entry into force was 30 days (article 34(1)). The Racial Discrimination Convention (article 19(1)) and the Vienna Convention on the Law of Treaties (article 84(1)) both provided for the same delay. Concerning the case of entry into force of the Economic Rights Covenant, the delay for the entry into force of the Covenant after the last required instrument of consent was 3 months

(article 27(1)), that is the same period as for the consultation by the Secretary-General.

An argument for applying the consultation procedure is that it is possible for a reservation to be absolutely null and avoid (if for example considered incompatible) which may deprive the instrument of ratification or accession its validity.⁸¹ However, this is an extremely unlikely case. An instrument of ratification will become invalid only if:

- (a) all the interested parties object to the reservation
- (b) all these objections are qualified, i.e., all treaty relations are excluded between the reserving state and the objecting states
- (c) the reserving state continues to maintain its reservation in spite of opposition.

This is the result of the Vienna Convention article 20(4)(b) confirming the minimum effect rule. In the case where the treaty provides a machinery for determining the admissibility and compatibility of a reservation there may be greater chances of invalidating a reservation.

The Secretary-General has maintained that the Vienna Convention does not bind him.⁸² This contention could be justified on a strictly formal ground but is untenable on practical and substantial grounds. As a depositary the Secretary-General is bound to follow the final clauses of treaties deposited with him, concerning entry into force, reservations, etc., even though he is not a party to the treaty. It suffices that the parties to the treaty have agreed that he is on their behalf to fulfil certain functions in accordance with the rules they have agreed upon. It does not matter if the parties have agreed on the functions of the depositary in the relevant treaty itself or in some separate treaty like the Vienna Convention. Even if not all parties have ratified the Vienna Convention many of the reservation rules seem binding as rules of general international law. The 12-month rule for establishing tacit acceptance is however a particular rule which cannot be proven to form part of international custom.

On the other hand, he has on many occasions actually referred to the provisions of the Vienna Convention when giving his opinion on matters concerning the operation of reservations.⁸³ Neither can he be ignorant of the fact that both the OAS and the Council of Europe have adopted rules which now largely conform to the provisions of the Vienna Convention. It must further be kept in mind that the proposed rules on reservations of the Convention on Treaties concluded between States and International Organizations or between two or more International Organizations are identical in substance to those found in the Vienna Convention.⁸⁴

It may be doubted if the consultation procedure is completely without legal effects for the states concerned. If a state does not question an instrument containing a reservation when determining the entry into force of a treaty, it would seem difficult for that state to contend later that the reservation is incompatible. It seems inconsistent that an interested state would not oppose the taking into account of an instrument subject to a reservation, when it at the same time considers the reservation to be incompatible and therefore

invalid. Where a reserving state does not withdraw its invalid reservation the whole instrument of ratification would become void. It appears that the Secretary-General had not thought of the possibility that non-opposition to this procedure may easily be construed as an acquiescence in the compatibility of a reservation. According to the institution of acquiescence a confronted state may lose its possibility to invoke the criterion of incompatibility at a later stage.⁸⁵

In none of the cases where he has resorted to the consultation procedure has there been any opposition by the interested states. What would happen in the case where there would be opposition? Would he then have to refrain from recognizing the respective instrument of consent as relevant for the entry into force of the treaty? This would probably result in grave criticism not only from the state whose instrument is affected but also from other states. In this situation the consultation procedure would in fact have the legally relevant effect of postponing the entry into force by one further 'unproblematic' instrument when the amount of 'cleared' instruments has achieved the required number.⁸⁶ Or is he to abstain from indicating the exact date of entry into force although the treaty itself imposes on him the duty to do so?

With regard to treaties concerning the United Nations and the Specialized Agencies the Secretary-General has had no doubts in choosing a more active role vis à vis contracting states making statements. Not only does he work actively in order to clarify the nature of doubtful statements advocating an understanding which is, according to him, the most appropriate solution, but he also makes declaring states abandon or withdraw statements which he considers undesirable or even incompatible. This greater freedom of action with respect to such treaties he infers from their special nature.

Concerning treaties containing constitutions of international organizations it may be questioned whether the Secretary-General is really pursuing a practice that is completely neutral with respect to such instruments of consent which are accompanied by reservations or declarations. It must be remembered that the passing of resolution 1452(XIV) by the General Assembly was the result of a dispute that arose from a statement concerning the constitution of an international organization, namely the IMCO. In connection with the receipt of the Malaysian and Ceylonese instruments of acceptance the Secretary-General did ask these states to clarify their statements to be simple "declarations of policy" and not reservations. In this case they confirmed the view of the Secretary-General, the statement had not become legally binding on the other member states and he was able to receive the instruments for definitive deposit. Had there been no clarification or the declaring state would not have shared the view of the Secretary-General, he would have felt obliged to refer the whole question to the IMCO, i.e., to apply the same procedure as he did on receiving the Indian instrument of acceptance and accompanying statement.⁸⁷ The Australian instrument of ratification was not accepted for definitive deposit until the Australian government had confirmed the view of the Secretary-General that its statement was only an interpretative declaration and not a reservation.⁸⁸ It is evident that the Secretary-General with respect to organizational treaties still continues to play an active role in the solution of problems that arise in connection with statements, and that his measures may have legally relevant effects, at least that of postponing the

entry into force of the treaty for the declaring state (if already in force). In the case where he and the declaring state do not come to a common understanding the question will as before be referred to the competent organ of the international organization. This practice is in accordance with article 20(3) of the Vienna Convention.

It is not quite certain that the Secretary-General is right in propagating a strict interpretation of the resolutions of the General Assembly.⁸⁹ It would seem a more reasonable understanding that the delegates voting in favour of the resolution had in mind the mutual legal relations between the contracting parties. The reasons for the dispute were the fear that the declaring state would find its statement rejected and its participation in the treaty or the organization endangered. It appears that whatever step the Secretary-General takes it will have some legal repercussions.⁹⁰

Imbert, who has critically analyzed the practice of the Secretary-General, has proposed two alternative solutions in order to eliminate the period of uncertainty which is the result of the treaty-stipulated delay of entry into force as counted from the deposit of the last required instrument of consent being shorter than the 90-day rule of the consultation procedure. The first solution is to let the delay for the entry into force of the treaty prevail over the rule of tacit consent.⁹¹ Irrespective of the number and the date of the formulated reservations, the treaty enters into force after the treaty-stipulated delay as counted from the receipt of the last required instrument. Each contracting state would nevertheless keep the right to contest the decision. The second solution is to apply both the rule of 12 months for tacit acceptance under the Vienna Convention and the treaty-based delay. The delay which is frequently 30 days, will be counted only after the period of 12 months for establishing tacit acceptance has expired, where some of the instruments have been subject to reservations. With respect to future treaties he envisages a final provision that would make the treaty enter into force 12 months after the receipt for deposit of the last required instrument of consent. The negative effect of this solution is that it will in a general way postpone the entry into force of treaties for an unreasonably long time.⁹² The second solution shows its defects in the case of doubtful statements. Some states may contend that the statement is a unilateral interpretation not requiring any consultation procedure of 12 months, whereas other states believe that it is a proper reservation and that tacit acceptance of the reservation must be established before any further rule on entry into force may apply. In such a conflict the Secretary-General will not be able to determine the exact date of entry into force.

The most simple solution would be to make a very clear distinction between the entry into force of the treaty and the question of acceptance and objection to a reservation. Each instrument of ratification, acceptance, approval or accession would be equally relevant for determining the entry into force of the treaty. The fact that an instrument of consent contains a reservation, interpretation or other kind of declaration, would not have any significance in this case. The question of accepting or objecting to a reservation has to be kept separate from the question of determining the actual nature of a doubtful statement.

The consultation procedure introducing the 90-day period for construing approval is based entirely on the assumption that a reservation may be declared void and that therefore the instrument of consent containing it may also turn out to be invalid. Keeping in mind that the Vienna Convention confirms the minimum effect of objections to be the general rule, the possibility that a ratification or an accession may become invalid preventing a state to become a party to the treaty is nearly non-existent.⁹³ This will only occur under the conditions mentioned earlier: all interested states make the maximum effect objection and the reserver is not ready to abandon its reservation.⁹⁴ Thus the chances of a reservation and even more so of an instrument of consent being invalidated are exceedingly small. They may be slightly greater with regard to organizational and restricted multilateral treaties. However, in the latter cases it is hardly likely that a state maintains its reservation. Recollecting the special category of treaties on the privileges and immunities of international organizations, statements that have been considered undesirable by the organs concerned have as a rule been abandoned. It seems somehow extravagant to found a rule or procedure on the assumption of a situation the occurrence of which is more hypothetical than real. This is even more true when such a procedure may lead to complications such as uncertainty as to the actual entry into force of the treaty. If the highly improbable happens and an instrument of consent is invalidated due to an inadmissible reservation, and the reserving state is excluded from participation in the treaty, this fact is probably only established after such a time that other states have meanwhile ratified or acceded to the treaty. Consequently, there will be no doubt as to the treaty being in force but only as to the date at which this occurred. Either it will be fixed on the basis of the last of the required instruments comprising the instrument of the reserving state, or if this instrument cannot be counted, on the basis of the next incoming instrument. However, if there is no subsequent ratification or accession which would bring the instruments of consent to the required number there will be a problem. The treaty would then, applying strictly its own clause on entry into force, not have come into operation. The only solution would be to stipulate a clear exception from the rules on entry into force in such situations.

In fact the consultation procedure does not obviate this problem. According to the Secretary-General himself the consultation procedure does not prejudice the question of objecting to the reservations, but concerns only the counting of instruments for determining the entry into force of the treaty. Thus he clearly admits the possibility of a reservation being objected to later and its incompatibility proven, as well as the invalidity of the consent. It must be kept in mind that the period for objecting under the Vienna Convention is 12 months and the period for opposing the action taken by the Secretary-General is only 90 days. The Secretary-General will in such a case have determined the date of entry into force of the treaty by counting an instrument that is later declared void *ex tunc*.

The consultation procedure has been resorted to only when the last instrument of consent needed for entry into force had contained a statement or if earlier instruments had contained statements where one or some of them have met with disapproval.⁹⁵ To be consistent the consultation procedure would

also have to be applied in cases where any of the earlier instruments of consent contains statements even if there had been objections to none of them. There may be a chance that they are objected to after the Secretary-General has established the date of entry into force of the treaty. Such objection may in theory lead to the invalidity of the whole instrument. On the other hand, it did not matter if the objection was made by a contracting state having consented to the treaty or only by a signatory, which will perhaps never participate in the treaty.⁹⁶

In the case of organizational treaties or other treaties providing for collective procedure as in the Racial Discrimination Convention we have again a problem. The machinery to determine authoritatively on the incompatibility and inadmissibility of a reservation may be available only once the treaty had entered into force. Article 20(2) of the Vienna Convention states that a reservation to a restricted multilateral treaty must be accepted by all the "parties" assuming that it may only be done when the treaty has entered into force.⁹⁷ The invalidity of the reservation and the possible invalidity of the instrument of consent may thus only be determined once the treaty is in force. Some such treaties state that they will enter into force only if all specified states have validly consented to it. A reservation not abandoned may let the whole treaty fall to the ground.

28.3 THE PRACTICE OF THE GENERAL SECRETARIAT OF THE ORGANIZATION OF AMERICAN STATES AS DEPOSITARY OF INTER-AMERICAN TREATIES

28.3.1 The rules on the depositary functions of the OAS General Secretariat

The Pan American Union being the forerunner of the present day General Secretariat of the OAS was assigned the functions of depositary pursuant to article VII of the 1928 Havana Convention on the Pan American Union. This Convention actually never entered into force.⁹⁸ It became necessary to regulate the competence of the PAU by other means. In 1932 the Governing Board of the Pan American Union appointed a Committee to elaborate the rules for the deposit of ratifications. The proposed rules on the depositary procedures also made reference to reservations. The PAU was:

3. To receive the instruments of ratification of the signatory States, including reservations.
4. To communicate the deposit of ratifications to the other Signatory States and, in the case of a reservation, to inform them thereof.
5. To receive the replies of the other Signatory States as to whether or not they accept the reservations.
6. To inform all the States, signatory to the treaty, if the reservations have or have not been accepted.

These rules were accepted on a provisional basis by the Governing Board and finally approved by resolution XXIX of the 8th International Conference of American States held in Lima 1938.⁹⁹ A state which wishes to ratify or ad-

here to an Inter-American treaty has to transmit the text of its reservation to the PAU so that the latter would be able to transmit it to the other signatory states and ascertain their reactions.¹⁰⁰ The wording of the resolution has raised some questions as to its effects on article 6 of the 1928 Havana Convention on Treaties which seems to express an absolute right to make reservations.¹⁰¹ It would seem unnecessary to ascertain the reactions of the other signatory states if there was an absolute right to make reservations. Resolution XXIX on the other hand stated that the reserving state may ratify the treaty taking or not taking into account the observations of the other signatory states. There was therefore no obligation to be bound by the views of the other states. The resolution intended only to introduce a period of grace allowing the reserving state to reevaluate the consequences of maintaining its reservation. The rules on procedure would have been more clear had the Conference also adopted the three rules on the juridical effects of reservations mentioned above in chapter XX.¹⁰² The treaty would according to them enter into force as between the reserving and the accepting or non-objecting states, but not between the reserving and the objecting states. We recognize here the maximum effect rule. If no state accepts the reservation, the instrument of ratification or adherence would nevertheless be accepted for deposit and counted in the number required for the entry into force, but the treaty would remain inoperative between the reserving state and each of the other states. As the substantive rules were not adopted by the Lima Conference the question of the legal effects of reservations and objections was not formally regulated. Nothing was actually said against the substance of the rules on the juridical status of treaties ratified with reservations that had met with objections. The only argument against them was that neither the Governing Board nor any Inter-American Conference was competent to hand down opinions on this matter.¹⁰³ The actions by the depositary under the procedural rules did not in any way affect the question of the operation of reservations and objections, but they did only provide the chance for the confronted states to express their views and a possibility for the reserving state to reconsider if it really wished to maintain its reservation in the face of widespread opposition. The delay in the deposit may also be motivated by the providing of a chance to bring clarity about a statement, when the other signatories have some doubts as to its nature and scope.¹⁰⁴ The only registered case of an objection within the OAS treaty system proves that the unadopted substantive rules were in fact considered to be relevant. When the United States in 1932 objected to the reservations by the Dominican Republic relating to the 1928 Havana Convention on Consular Agents it was held to make the whole Convention ineffective between these two states.¹⁰⁵

The need to formally regulate the question of reservations became apparent in 1950 when the Inter-American Economic and Social Council stated that some of the treaties signed at the Bogotá Conference in 1948 could not become effective because of the numerous reservations that had been presented to them.¹⁰⁶ This concerned in the first place the 1948 Economic Agreement of Bogotá to which 12 of the 21 signatory states presented reservations or declarations and which did not enter into force.¹⁰⁷ The Council of the OAS was asked to review the question of the legal effects of reservations. This was then

delegated to the Inter-American Juridical Committee and the Inter-American Council of Jurists which actually came to propagate quite different solutions. The Committee was against a too categorical regulation arguing that the legal effects of accepted and rejected reservations were to be established in accordance with the intentions or the presumed reasonable intentions of the parties. There were so many different categories of treaties that each of them would require a distinct reservation regime.¹⁰⁸ The Council originally proposed a majority rule, but finally decided to revitalize the previous rules of the PAU with certain minor alterations and improvements. Resolution X of the 4th meeting of the Council in 1959 was the last official pronouncement on the question of the regime applicable to reservations until 1973. In spite of disagreement on certain parts of the resolution, it provided the guidelines that were in practice followed by the General Secretariat of the OAS.¹⁰⁹ The General Secretariat as the successor depositary to the Pan American Union was to transmit reservations to the signatories in order to find out whether or not they accepted them. A new ingredient was that if no reaction from a signatory state had been received within one year, it was understood that there was no objection.¹¹⁰ The Secretary-General was to inform the reserving state of all the observations that had been made with regard to the reservation so that the former would have a chance to reconsider. As it was possible to determine which states had objected and what were the reactions of the reserving state only after the expiry of the one-year period, the Secretary-General of the OAS has followed the practice of not accepting for deposit an instrument subject to a reservation before the end of the one-year period. The motive behind this procedure is certainly not the hypothetical possibility of an instrument becoming ineffective as mentioned by the UN Secretary-General. No objection may invalidate an instrument of ratification as such. Even in the very unlikely case that all signatories would object, the OAS Secretariat would be obliged to proceed with the deposit of the respective instrument after the expiry of one year. The only reason behind this delay in accepting an instrument for deposit is to explore the views of all the confronted states in order to grasp the general apprehension about the reservation. Where opposition is general, the reserving state may find it wise to abandon its reservation because it would then, according to the maximum effect rule, be in treaty relations with only the few states not objecting to its reservation. The reserving state is however not obliged to abandon its reservation.

The General Assembly of the OAS has in its resolution 102 of 14 April 1973 accepted the "Standards on Reservations to Inter-American Multilateral Treaties". They reflect a closer concurrence with the reservation rules in the Vienna Convention. The standards for example stipulate the minimum effect of objections. On the other hand, they still reiterate the one-year delay for consulting the confronted states on their views on reservations in provisions A(6) and (7) as well as D(3) and (4).¹¹¹ Furthermore the compatibility criterion has not been introduced.

Occasionally it has occurred that there has been some uncertainty as to the depositary procedures of the OAS Secretariat considering the consultation period of one year before affecting the definitive deposit of the instrument of

consent carrying the statement. In order to avoid misunderstandings as to the date of definitive deposit the Secretariat has not received the instrument of consent but simply taken note of the accompanying reservation for further transmission to the interested states.

28.3.2 The advisory opinion of the Inter-American Court of Human Rights on the effect of reservations on the entry into force of the American Convention on Human Rights

The object of the dispute was the depositary practice of the OAS Secretariat with regard to the American Convention on Human Rights. According to article 74(2) the Convention was to enter into force immediately upon the deposit of the 11th instrument of ratification or adherence.¹¹² Barbados' instrument of ratification was the 11th instrument which the Secretary-General received on 5 November 1981. As it contained a statement it was not accepted for definitive deposit until 27 November 1982 after the Secretary-General had followed the consultation procedure of one year.¹¹³ The correctness of this procedure was questioned and resulted in a request by the Inter-American Commission on Human Rights for an advisory opinion by the Inter-American Court of Human Rights. The dispute concerned the interpretation of the following provisions:

Article 74(2)

Ratification of or adherence to this Convention shall be made by deposit of an instrument of ratification or adherence with the General Secretariat of the Organization of the American States. As soon as eleven states have deposited their instrument of ratification or adherence, the Convention shall enter into force. With respect to any State that ratifies or adheres thereafter, the Convention shall enter into force on the date of deposit of its instrument of ratification or adherence.

Article 75

This Convention shall be the subject to reservations only in conformity with the provisions of the Vienna Convention on the Law of Treaties signed on May 23, 1969.

The Inter-American Commission on Human Rights requested on 28 June 1982 an advisory opinion of the Inter-American Court of Human Rights on the following question:

"From what moment is a state deemed to have become a party to the American Convention on Human Rights when it ratifies or adheres to the Convention with one or more reservations: from the date of the deposit of instrument of ratification or adherence or upon the termination of the period specified in Article 20 of the Vienna Convention on the Law of Treaties."

On 24 September 1982 the Court gave the following short opinion:

"With regard to the interpretation of Articles 74 and 75 of the American Convention on Human Rights concerning the effective date of entry into force of the Convention in relation to a State which ratifies or adheres to it with one or more reservations, the Court is of the opinion by unanimous vote, that the Convention enters into force for a State which ratifies or adheres to it with or without a reservation on the date of deposit of its instrument of ratification or adherence."¹¹⁴

The court based its opinion on the following arguments and considerations: Firstly, it was evident from the drafting history of the Convention that article 75 must be seen as a manifestation of the will of the negotiating states to provide for a system that would be very liberal in permitting states to adhere to the Convention with reservations.¹¹⁵ Article 67 of the draft for an American Convention on Human Rights, prepared by the Inter-American Commission on Human Rights contained a much more restrictive clause on reservations permitting the contracting states "to make a reservation if a constitutional provision in force in the territory of the ratifying or adhering state should be contrary to any provision of this Convention".¹¹⁶ The reserving state was further asked to deliver the text of the referred to constitutional provision.¹¹⁷ The reservation clause as finally adopted in the Human Rights Convention must be understood to permit any reservation that is compatible with the aim and purpose of the Convention.¹¹⁸

Secondly, the Court considered that the reference in article 75 of the Human Rights Convention to the Vienna Convention was an "express authorization" to make reservations and therefore no acceptance was required in accordance with article 20(1) of the Vienna Convention.¹¹⁹ Where a reservation was required to be accepted, then a reserving state could be deemed to have become a party only from the moment when at least one other state had accepted the reservation. If such acceptance was not express, which has very seldom been the case, the acceptance could be construed only after the lapse of 12 months as mentioned in article 20(5) of the Vienna Convention. The Court now held for various reasons that no acceptance of reservations to the American Human Rights Convention was required:

(a) The Convention belonged to those international compacts which "are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States".¹²⁰ Being a humanitarian convention the parties were submitting themselves to a specific legal order, the aim of which was to realize a common good. Obligations were not assumed on a bilateral basis with regard to other states, but towards all individuals within their jurisdiction.¹²¹ As the Convention was not to operate on a mutual and bilateral basis there was no justification for requiring any acceptance of a reservation by another state, as this would have the effect of postponing the entry into force of the Convention.

(b) Furthermore, the Court held that any reservation which was not incompatible with the aim and purpose of the Convention was "expressly authorized" according to article 20(1) of the Vienna Convention and did therefore not need to be accepted. The court deemed that this express authorization had been given through article 75 of the Convention. The express authorization did according to the Court mean not only "specific" but also "general" authorization.¹²²

This reasoning by the Court begs some comments, especially as concerns the argument that acceptance is not required. Pushed to the extreme it would mean that acceptance of reservations is irrelevant with regard to human rights treaties because they do not operate on a mutual basis. However, it cannot be accepted that reservations to human rights treaties, even if compatible, have

to be tolerated by the confronted states. Although many human rights treaties do not have reservation clauses, there are some which do. The Convention on Racial Discrimination prohibits incompatible reservations and provides for machinery to establish this incompatibility objectively, but it also permits objections on other grounds than incompatibility. The Convention on Political Rights of Women allows for objections to reservations. The Convention against Discrimination of Women also has a reservation clause. Though this clause does not state anything about objections, it is evident that objections may be possible.¹²³

As the Court itself admitted that incompatible reservations may be presented to the American Convention on Human Rights, the consultation of the other interested states may be required so that they will have a chance to give their opinion on the compatibility of the reservation. On the other hand the Court uttered that: "... it would be manifestly unreasonable to conclude that the reference in article 75 to the Vienna Convention compels to the application of the legal regime established by article 20(4), which makes the entry into force of a ratification or accession dependant upon its acceptance by another state" (at least one).¹²⁴ The idea that human rights treaties are completely void of mutual or bilateral aspects is erroneous. States consent to human rights treaties on the condition that other states do the same. This may be already inferred from the clauses on entry into force usually requiring a number of ratifications before they will become operative.¹²⁵ It is hard to believe that any state will enter into a human rights treaty regardless of the intentions of other states to do so. An aspect of mutuality is also present in the clauses on the compulsory settlement of disputes under human rights treaties. States are the principal parties in a possible litigation. The right of petition for the individual welcome as it may be, is only a secondary remedy.

Nor is it the case that objections are always made in order to protect strictly egoistic interests of states, especially not in the case of human rights treaties.¹²⁶ They may be motivated by the belief that a reservation can considerably weaken the legal status of the individual and jeopardize the objects of the treaty. If an objection is made to a reservation to a human rights treaty, the chances are greater of invoking the incompatibility of the reservation. Naturally it is laudable to think of the interest of the individual and to have a treaty concerning his rights enter into force as soon as possible, bestowing on the individual for example the right of petition as under article 44 of the Convention.¹²⁷ On the other hand, it is also in the interests of the individual to see a human rights convention enforced with as few reservations as possible. How many reservations to such treaties operate to the benefit of the individual? The consultation procedure of one year as applied by the General-Secretariat has the purpose of uncovering any possible opposition to a reservation and providing a smooth way for the reserving state to abandon its reservation when it faces strong condemnation. Thus the delay may equally operate in favour of the individual.

Ultimately the assertion that article 75 of the Convention amounts to an express authorization to make reservations according to article 20(1) of the Vienna Convention and therefore does away with the freedom to accept or object is a bold interpretation. Article 75 is less an authorization to make

reservations, than an indication that any possible reservations and objections to the Convention should be governed by the Vienna Convention regime, which is a completely different thing. One may ask if the fact that article 75 could have stated that the formulation and operation of reservations ought to follow the regime as set up by resolution X of the 1959 meeting of the Inter-American Council of Jurists would have constituted such an express authorization? This would certainly not be logically sustained as these rules recognize the possibility of accepting and objecting. The Court errs in asserting that the wording "express authorization" does not only mean "specific authorization" in the sense of authorized individualized or standard reservations but also "general authorizations". The *ad hoc* Court of Arbitration in the *Anglo-French Continental Shelf* arbitration clearly stated that article 20(1) of the Vienna Convention covers only "specifically authorized reservations". According to the Court of Arbitration the fact that the Continental Shelf Convention permitted the formulation of reservations to all articles except articles 1 to 3, does not revoke the right of objection:

"On the other hand, the Court considers the view expressed by both Parties that Article 12 cannot be read as committing States to accept in advance any and every reservation to articles other than Articles 1, 2 and 3 to be clearly correct. Such an interpretation of Article 12 would amount almost to a license to contracting States to write their own treaty and would manifestly go beyond the purpose of the Article. Only if the Article had authorized the making of *specific reservations* could parties to the Convention be understood as having accepted a particular reservation in advance (emphasis added). But this is not the case with Article 12, which authorizes the making of reservations to articles others than Article 1 to 3 in quite general terms. Article 12, as the practice of a number of States recorded in *Multilateral Treaties in respect of which the Secretary-General Performs Depositary Functions* confirms, leaves contracting States free to react in any way they think fit to a reservation made in conformity with its provisions, including refusal to accept the reservation. Whether any such reaction amounts to a mere comment, a mere reserving of position, a rejection merely of the particular reservation or a wholesale rejection of any mutual relations with the reserving State under the treaty consequently depends on the intention of the state concerned."¹²⁸

Objections are clearly possible to reservations which are authorized in general terms. As indicated in the award, state practice clearly and unambiguously shows that objections have been made and believed to be possible and effective in cases of general authorizations. Reservations to the Continental Shelf Convention have experienced a certain number of objections, all of which have been registered with the Secretary-General and none of which has been contested.¹²⁹

What somewhat blurs the whole issue is that no closer analysis has been made of the relationship between the reservation clause in the American Human Rights Convention and the rule of tacit acceptance in article 20(5) of the Vienna Convention and the OAS Standards on Reservations. Article 75 refers only to the substantive provisions on reservations as expressed by articles 19 to 23 of the Vienna Convention. These provisions do not regulate the effect of reservations for determining the entry into force of a treaty. Article 16 of the Vienna Convention states only in quite general terms:

Unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of a State to be bound by a treaty upon:

- (a) –
- (b) their deposit with the depositary;
- (c) –

Furthermore article 77 on the functions of the depositary comprises among other things the following provision:

- (d) examining whether the signature or any instrument, notification or communication relating to the treaty is in proper and due form and if need be, bringing the matter to the attention of the State in question;

In order to elucidate the problem there must be made a clear distinction between the rule of tacit acceptance on the one hand, and the procedure on the consultation for determining the entry into force of the treaty on the other hand. With regard to the treaties deposited with the UN Secretary-General the distinction is clear.¹³⁰ Under the Standards of 1973 the rule on tacit acceptance which governs the relations between the parties, and the rule on consultation which operates between the OAS Secretary-General and the submitting states, are not easily distinguished from each other. The period for tacit acceptance or objection is as long as the period of consultation. Provision A(6) of the Standards provides that a state intending to attach a reservation to its instrument of ratification or adherence "shall send the text of the reservation to the General Secretariat prior to the deposit of the instrument, so that the Secretariat may carry out the consultations provided for in paragraphs 3 and 4 of section D of the Standards". Section A paragraph 7 states further that, "If the contracting states that the General Secretariat has consulted on the text of the reservation have not formulated objections within one year after the date of communication from the General Secretariat, they shall be considered to have accepted the reservations." This means that only after the expiry of this period the Secretariat will be able to establish the reception the reservation has received and inform the reserving state. The substantive rule on tacit acceptance in paragraph 7 is identical with the Vienna Convention rule on tacit acceptance, and it would seem irrelevant if one were to apply the substantive rules of the Convention or of the Standards for determining the relationship between a reserving state and the confronted states. The heart of the matter is however that the General Secretariat was applying its traditional rule on consultation which should in no way be disturbed by the reference to the Vienna Convention in article 75 of the Pact of San José. The Vienna Convention does not provide any rule on the consultation procedure. It may be misleading that the General Secretariat did itself propagate in its requested observation the application on tacit acceptance of article 20(5) in the Vienna Convention as it in fact had applied the consultation procedure of the Standards.¹³¹

The request of the Inter-American Commission on Human Rights for an advisory opinion was inaccurately formulated and this confounded the issue. The question was not to decide whether the reserving state had become a party

from the date of deposit of its instrument of ratification respectively adherence, or upon the termination of the period specified in article 20(5) of the Vienna Convention. The instrument of ratification of Barbados was received on 5 November 1981, but it was *not accepted for deposit* on that date, but only at the expiry of one year from that date. The General Secretariat registered 27 November 1982 as the actual date of deposit.¹³² In the depositary practice there is a clear distinction made between the *receipt of an instrument* and the *final deposit of an instrument*. In most of the observations received by the Court in the matter, the date of 5 November 1981 is erroneously referred to as the date of deposit, even in the written observation by the United States. The Government of the United States was otherwise the only one which in its observation was aware of the distinction which was being made between the tender or the receipt of an instrument and the actual deposit of that instrument.¹³³ The same practice is also followed by the US Secretary of State in his functions as depositary.¹³⁴

The request of the Commission for advisory opinion by the Inter-American Court of Human Rights would more correctly have been formulated in the following way:

“Does article 75 of the Inter-American Convention on Human Rights prevent the OAS General Secretariat from applying the consultation procedure of one year with respect to instruments of ratification or adherence to that Convention?”

On the basis of the arguments presented above the answer ought to be in the negative. A completely separate question is if the consultation procedure is actually necessary, a question that concerns also the 90-day consultation procedure of the UN Secretary-General. It is likely that the advantages of the consultation procedure do not outweigh the possible complications that have arisen and always may arise from its application. The justification for the UN consultation is the theoretical possibility that an instrument with a reservation may turn out to be invalid due to an inadmissible reservation. Such a situation occurring is quite improbable and seems a poor justification for maintaining the consultation procedure and hindering the introduction of a smoother rule. The major argument for the OAS consultation procedure is to provide the confronted states with a chance to influence the formulation of a reservation and to provide the reserving state with a possibility to reconsider its stand.¹³⁵ The consultation procedure will not be able to oblige the reserving state to abandon its reservation. On the other hand, it may also be contended that even if an instrument with a reservation is immediately accepted for deposit on receipt, the confronted states are free to propound their views and if the opposition turns out to be strong the reserving state may withdraw its reservation at any given moment. The possible different legal consequences of abandoning a reservation prior to definitive deposit and withdrawing a reservation after deposit may be negligible. In the latter case a reservation may for a short time be operative with respect to a limited number of parties.¹³⁶

28.3.3 Determining the nature of obscure statements

The traditional Pan-American reservation regime does not recognize the criterion of compatibility. The question of admissibility is simply a question of acceptability. The condition of admissibility is unequivocally a subjective notion and its presence has to be settled on a bilateral basis. Explicit exception is now made in the Standards of 1973 with regard to reservations to organizational treaties (section A(5)) and restricted multilateral treaties (section A(4)). The Pan-American reservation regime has all along been hostile to the criterion of compatibility. That the test of compatibility may slip in through the backdoor is proven by article 75 of the American Convention on Human Rights. The reference to the provisions on reservations in the Vienna Convention makes the notion of compatibility become relevant.¹³⁷ The General Secretariat of the OAS as the depositary of the convention would not have the competence to settle the question of compatibility of a reservation. However, once objections have become numerous there may be doubts as to the compatibility of the reservations. The General Secretariat may raise the matter of incompatibility in order to check the general view among the other parties. A possible dispute as to the compatibility of a reservation to the American Human Rights Convention may be settled by asking the Inter-American Court of Human Rights for an advisory opinion. This may be done either by a state party or a competent organ of the OAS.

The General Secretariat does undertake an analysis of statements made to treaties deposited with it in order to determine its nature where the designation or formulation leaves some doubt. It would appear that the General Secretariat has encountered some difficulties in determining the real nature of a statement. In principle this determination is made in close consultation with the state submitting the statement.¹³⁸ It seems that the General Secretariat has tended to rely too heavily on the designation used by the submitting state. Many of the statements registered as "reservations" by the OAS Secretariat would on closer analysis reveal themselves to be declarations. Take for example the statement of the Dominican Republic to the 1928 Havana Convention on Commercial Aviation formulated on signature and confirmed on ratification.¹³⁹ The Dominican Republic declared:

"The Delegation of the Dominican Republic records, as an *explanation* of its vote, that upon signing the present Convention it does *not understand* that the Dominican Republic dissociates itself from Conventions it has already ratified and which are in force." (emphasis added)

The Dominican statement expresses the view that the present convention did not conflict with the other treaties it had already entered into, but it is hard to construe this as a derogation from any of the obligations of the convention. Similarly, the statement by Peru when adhering to the 1923 Santiago Treaty to Avoid and Prevent Conflicts between the American States (Gondra Treaty) is registered as a "reservation" though it more correctly ought to be called a declaration:

“With the express and definite *reservation* that the adherence of Peru does not alter the arbitration and good offices of the President of the United States of America and his Government in the matter of Tacna and Arica.¹⁴⁰

Article I of the treaty is residuary in character insofar as it introduces an obligation to submit a controversy to the Commission of Inquiry established in the manner provided for in article IV if it has been impossible to settle it by diplomatic negotiations or arbitration.¹⁴¹ There is no question of the Treaty invalidating a solution that is reached by arbitration. The statement is affirmative in character as it only gives an example of a case that has not been settled in violation of the Treaty.

The General Secretariat of the OAS will have to consult the signatories before accepting for deposit an instrument that is accompanied by a reservation. Where simple declarations are presented on giving definitive consent to a treaty the consultation would according to a strict interpretation of the Standards not be required. If there are some doubts as to the real nature of a doubtful statement the tendency has been to follow the consultation procedure. The correct procedure would be to ask the declaring state for a clarification. If it is agreed upon that the statement amounts to a reservation the text of the statement will be transmitted to the interested states. If it is affirmed that the statement is only a declaration, consultation is not acquired and the General Secretariat would immediately proceed to affecting the deposit of the instrument and declaration.¹⁴²

28.4 THE PRACTICE OF THE COUNCIL OF EUROPE AS THE DEPOSITARY OF EUROPEAN CONVENTIONS

Owing to the sophisticated procedure to agree on which reservations are to be admitted to the European conventions, these have as a rule not created any problems for the Secretary-General of the Council of Europe in his capacity as depositary. Usually a European convention specifies in its final clauses what kind of reservations may be presented (specified authorization) or it enumerates in an annex the reservations that certain states wish to enter (individual authorization).¹⁴³ The Secretary-General only has the task of controlling if the reservations that accompany the instrument of ratification conform with the final clauses or the annex. He makes an independent evaluation of the nature of a statement and determines whether it is a proper reservation or only a declaration. The Secretary-General has as a rule not been forced to consult the submitting state as to the content of a statement, as the statements have been sufficiently clear.¹⁴⁴

Objections are usually not relevant.¹⁴⁵ The Secretary-General usually does not make inquiries as to the reactions of the interested states towards reservations and/or declarations.¹⁴⁶ As objections are not commonplace the question of their effect on the entry into force of a convention is irrelevant. Instruments of ratification are at once counted among the number necessary to make the convention enter into force.

The Secretary-General of the Council of Europe has on one occasion faced

a problem concerning his depositary functions. Turkey did on 19 December 1975 present her instruments of ratification to seven European conventions with an accompanying letter stating that:

“Le Gouvernement de Turquie, tout en ratifiant l'Arrangement (la Convention, l'Accord, le Protocole) . . . , déclare qu'il ne se considère pas engagé à exécuter les dispositions dudit Arrangement (de ladite Convention, dudit Accord, dudit Protocole) envers l'Administration chypriote grecque qui n'est pas habilitée constitutionnellement à représenter à elle seule la République de Chypre.”¹⁴⁷

The question arose if this statement was a reservation. The statement could not be assimilated with any of the authorized reservations; one of the treaties did actually explicitly prohibit any kind of reservations.¹⁴⁸ The Secretary-General did not consider himself competent to pursue the registration of the Turkish instruments of ratification, but asked the Committee of Ministers which had adopted the text of these treaties to give its advice on the matter. In spite of long deliberations on the nature of the Turkish statement and its effects, the Committee was unable to give any clear and definitive opinion on the nature of the statement. Owing to the irreconcilable views of the governments the Committee asked the Secretary-General to pursue the registration of the instruments of ratification by Turkey without passing any judgement as to the question of whether the statement was a true reservation or only a declaration:

“Le Comité des ministres, à la lumière des discussions ci-dessus rapportées et en référant aux seuls aspects procéduraux du dépôt des sept instruments de ratification, estime que le Secrétaire général devrait procéder, avec effet au 19 décembre 1975, à l'enregistrement de ces instruments de ratification tels que présentés par le représentant permanent de la Turquie par lettres du 19 décembre 1975 et en donner notification aux gouvernements des Etats membres, étant entendu que l'enregistrement de *réserve*s par le Secrétaire général n'a aucun effet sur leur validité. La décision ci-dessus n'affectera en aucune façon la position du gouvernement de la République de Chypre au Comité des ministres du Conseil de l'Europe.” (emphasis added)¹⁴⁹

The utilisation of the term “réserve” was due to the insistent wish of the Turkish government. The Committee of Ministers as such reserved its position with regard to the statement.¹⁵⁰ There was thus no final accommodation on the true nature of this statement.

The Turkish statement resembles a declaration of non-recognition, because Turkey declares that it does not consider itself in any treaty relations with the Greek Cypriot administration. According to the concept of reservation as used in this work the Turkish statement would not qualify as a true reservation. It does not ‘alter’, ‘modify’ or ‘derogate’ from certain of the norms under the seven conventions, but it obstructs the application or ‘excludes the operation’ of the entire agreements between Turkey and a non-recognized political entity such as the Greek Cypriot administration. It must further be stressed that the reservation regime for the Vienna Convention with its rules on the legal effect of acceptance and objections would hardly be

possible to apply to a statement of such a kind.¹⁵¹ A completely different thing is that one may construe an obligation for each of the member states of the Council of Europe to abide by the norms of the European conventions with regard to all other member states of the Council which have also become parties to these conventions irrespective of their regime. Where a member state is not ready to do this, it may be construed as a violation of the aims and purposes of the Statute of the Council of Europe.¹⁵²

CHAPTER 29

CONCLUSIONS

Although the number of reservations formulated by states is small compared with the number of their treaty commitments, and the number of objections is even smaller; the problem of reservations occupies a central place in treaty law. It is not the frequency of reservations but the complex and intricate questions that they have raised or may raise, which justifies a closer examination of the subject. The fact that within a relatively short time so much has been written about reservations is symptomatic of the pertinence of the problem. Recent legal cases have shown that reservations can be at the very heart of contentions concerning treaty implementation. Certainly, the future will present new cases where the reservation rules will have to be analyzed. Much has happened since the ICJ gave its advisory opinion in the *Reservations* case in 1951. The debate has undoubtedly profited from an improvement in conceptual distinctions. Nevertheless, it must be pointed out that although the conclusions reached by the *ad hoc* tribunal in the *Anglo-French Continental Shelf* arbitration, and regional legal organs such as the European Court and Commission for Human Rights, have brought us a little farther in matters concerning reservations, there still remain many questions in need of clarification.

The present work is only one of numerous studies on reservations and must be seen as but a contribution to a discussion that is bound to continue. There are always new and unexpected aspects that are certain to arise. As legal science is a process, no matter, not even that of reservations, may experience a final and completely satisfactory elaboration.

The purpose has been to describe the reservation rules of the Vienna Convention as a regime, where each rule is assumed to have a function. It is not satisfactory that, for example, the institution of objections should be deemed of no relevance, because objections have no effects that are different from those which result from acceptance of reservations. This has often been held to be the case with 'excluding reservations' has also been considered to cover 'restricting reservation', as was done by Zoller when analysing the French statements to the Continental Shelf Convention.¹ The drafters of the Vienna Convention desired to protect the interests of both the reserving and the confronted states. This must be kept in mind when trying to reach an equitable solution.

The construction that reservations contraregulate the relevant subject-matter whereas objections deregulate it, would allow for some relevance for the institution of objections. This works with respect to mutually operating rights and obligations.

An objection to a reservation leaves the subject-matter unregulated by the treaty. Neither the original treaty norm is opposable to the reserving state nor the norm introduced by the reservation opposable to the objecting state.

The practical effects of a deregulation depend very much on where the relevant act or situation occurs. If it takes place in the territory of the objecting state, the question will most probably be settled according to the discretion of that state. A receiving state that has objected against a reservation to the Diplomatic Relations Convention denying its right to fix unilaterally the size of diplomatic missions, is able to maintain its view against the opposition of the reserving state. Where the act or event under treaty regulation is one that will fall under the territorial jurisdiction of the reserving state, it may carry out its intentions. Where a state ratifying the 1954 Convention for the Prevention of Pollution of the Sea by Oil does not accept the obligation to build shore facilities for the discharge of oil residues, an objecting state will hardly be able to press for the construction of such facilities. Where the act or situation is one that occurs outside the territorial jurisdiction of both the reserving and the objecting state, as for example in matters concerning the use of the high seas or outer space, proper conflicts may arise as both parties try to execute their own respective plans. A reserving state will try to commit the act the prohibition of which it has rejected by a reservation and the objecting state will try to prevent such an act. In the legal sense however the acts or situations are to be treated similarly irrespective of where they occur. A solution of the dispute is not possible on the basis of the relevant treaty.

In principle an objecting state which has not accepted a freedom of action as propounded by a reservation will not have the duty to respect that freedom where extraterritorial acts are concerned. It may interfere with this freedom without having violated any norm of the treaty. A reserving state may not have accepted that the immunity of government ships extends only to non-commercial ships in accordance with the 1958 Convention on the High Seas but wishes it to comprise all government ships. A state which objects to such a reservation and which then boards or otherwise interferes with the passage of a commercial government ship, suspected of having committed an unlawful act and which belongs to the reserving state, cannot be held to have violated any obligations under the treaty norms being in force between the reserving and the objecting state.

The deregulation from the treaty owing to a reservation which has been objected to, does not necessarily mean that the subject-matter is void of any legal regulation. A dispute between a reserving and an objecting state concerning the subject-matter which was regulated by the relevant norm may be settled if a norm is available under another treaty or under international customary law.² An objecting state is able to present a valid claim if it may prove the existence of such a norm. This was actually the contents of the *Anglo-French Continental Shelf* arbitration. If the special circumstances condition is construed as a reservation, as it was in the above-mentioned case, the equidistance-special circumstances rule of the convention becomes partly inapplicable due to the UK objection. Such a rule may have been applicable had it been proven to be a norm of international customary law. The tribunal did not expressly state this. It found, however, that there was an established principle of equitable delimitation which permits that special circumstances may be considered and that the equidistance method may be used where this would lead to equitable delimitation.

Acceptance of a reservation will have the effect that the subject-matter remains formally regulated between reserver and acceptor in accordance with the reservation. An accepting state is debarred from invoking the original treaty norm against the reserving state. A confronted state that claims a breach of the original treaty norm will find the claim rejected by a tribunal because of its express or tacit acceptance. The reservation has the effect of a special agreement operating only between the reserving and the accepting state. Such an accord may also be at variance with international custom.³ Only a norm of superior value, such as a peremptory norm forming part of *jus cogens*, invalidates the bilateral engagement between reserver and acceptor. A state having accepted the reservation on the immunity of commercial government ships has committed a breach if it interferes with the passage of such a ship. A state having accepted the reservation denying the right of unilateral determination of the size of diplomatic missions, may only fix the size of the mission of the reserving state with that state's approbation. A state not having rejected the French reservation to the Continental Shelf Convention opposing the application of the equidistance method beyond the 200-metre isobath may not in a later delimitation dispute invoke that method neither on the basis of the Geneva Convention nor on the basis of a possible international customary norm.⁴

With respect to human rights treaties operating mainly in the sphere of intrastate relations between state authorities and subjects, the concept of deregulation does not apply as such. There are simply no mutual relations between states to deregulate. An objection however will have the effect of making it possible for the objecting state to question acts by the reserving states where they have effects on the international level. Where a state is not willing to accept the reservation denying the equal rights for women with respect to the nationality of their children as guaranteed under article 9 (2) of the 1979 Convention on Discrimination against Women or the reservation to article 2 of that same Convention requiring protection by competent national tribunals against acts of discrimination against women, it may by an objection safeguard its right to raise the question of a violation of an international minimum standard for the treatment of foreigners.⁵ An objecting state may wish to protect the rights of its female nationals, married to men who are nationals of the reserving states. It may argue the reservation to be incompatible with the object and purpose of the Convention.⁶ Article 28 (2) of the Convention explicitly forbids incompatible reservations. It would then be up to an arbitration tribunal or the ICJ, as provided for under article 29, to find out if the reservation is incompatible.⁷ An acceptance however will amount to approval of any derogation, and an accepting state could not present a valid claim before a tribunal or court against these reservations. Here then there is a difference between the effects of acceptance and objection on the level of secondary norms of enforcement of treaty norms.

The construction of deregulation is not apt to work with respect to reservations and objections which bear on compulsory disputes settlement clauses. In this case we have only two alternatives: Either there is an obligation to submit to a certain procedure for disputes settlement or there is none. The

freedom from submission to compulsory jurisdiction is a strong one. An objecting state does not have the means to make its view prevail.⁸ It is however not possible to assimilate this freedom with a legal liberty. It seems meaningless to state that the absence of duty to submit to disputes settlement is sanctioned by the norm system itself. Where compulsory litigation is disputed it will hardly be possible to prove such an obligation to exist under international customary law. There is but the general obligation to settle disputes by peaceful means, leaving the choice of procedure to the parties in the dispute.

The compatibility question that has been discussed at large during the preparatory work of the Vienna Convention, has not been analyzed in any legal dispute. Possibly compatibility has not been assumed to be too great a problem. There is, however, always the possibility that this requirement may become an issue in a dispute that will be adjudicated. Admittedly, international tribunals will be able to interpret reservations.⁹ This competence also covers the compatibility question. Even within the regional treaty relations between the American states, where the reservation regime does not provide for the compatibility test, it may become relevant. This may be possible through the intermediation of a reservation clause similar to the one we find in article 75 of the American Convention of Human Rights. A treaty may have a reservation clause expressly requiring a reservation to be compatible with the aim and purpose of the treaty. The Convention on Racial Discrimination and the Convention on Discrimination against Women have such a clause prohibiting incompatible reservations.¹⁰ A judicial organ has to determine the compatibility of a reservation where one of the parties to the dispute decides to raise the question irrespective of it being expressly mentioned in the treaty itself.

The question of doubtful statements poses a real problem, as is proven by some more recent legal decisions. Thus, it is not a case of pure theoretical speculation, as the preparatory work of the Vienna Convention may suggest. The nature of the statement has to be settled before its legal effects may be ascertained. The aim should be to find a solution that best satisfies the interests of all the parties to the treaty, the declaring as well as the confronted states. Many reasons speak in favour of presuming an obscure statement to be a *prima facie* declaration of interpretation, application or policy which is not binding on the confronted states. This is naturally in the interest of all the states confronted by such a statement. A state cannot be supposed to reserve its position with respect to all statements that may contain reservations. There is also an interest to safeguard as far as possible the integral functioning of the treaty. It is usually easier to solve a dispute by considering a statement to contain an argument concerning the interpretation of the treaty. The solution may thus be extracted from the provisions of the treaty by the traditional methods of interpretation. Were the disapproved statement to exclude the subject-matter from regulation one would have to look for applicable norms within the body of international customary law which may prove to be more laborious.

A state which is determined not to abandon its interpretation and which wishes to avoid international responsibility owing to a possible treaty violation, should form its statement in terms which unequivocally prove that

it will constitute a reservation once it is established that the statement actually alters certain norms in the treaty. The real nature of the statement has to be established in an authoritative way; it is at this stage, and not before, that the reservation regime with its rules on acceptance and objections, and their effects, should enter into operation.

It is reasonable that rules will only apply once the parties can be assumed to have agreed on the very foundations for their operation. Certain of the general legal principles formerly held to be valid under international law lost their relevance due to the fact that new states have begun to maintain that they do not form part of international law. The abandonment of the unanimity rule was the result of such a revaluation of the assumption of its bindingness.

There may be a problem in determining the moment from which the 12 months for assuming tacit consent has to be counted. As to restricted multilateral treaties this date may be easy to settle. Within the Council of Europe the period may be counted from the day the judgement of the European Court of Human Rights has been passed.¹¹ The member states must be assumed to have received knowledge of the judgement without considerable delay.¹² With respect to European treaties it must be remembered that the elaborate reservation clauses mean that objections hardly occur.¹³ Nor are objections commonplace within the framework of Pan-American co-operation.

Where obscure statements refer to general multilateral treaties the problem of when the regime of reservations will enter into operation may become more real. According to article 62 of the Statute of the ICJ, parties to the treaty which are not parties to the dispute will be informed about the proceedings in the case. They will receive knowledge of the final decision and thus become aware of the view of the court as to the nature of the statement. On the other hand, we have to remember that decisions by the ICJ only bind litigants and intervening states. Where such a judgement establishes the derogatory effect of the statement, all the states bound by the decision are considered to have recognized the reservation character of the statement. They would have to react within 12 months from the communication of the judgement in order not to be bound by the statement. Confronted states not parties to the conflict and not having intervened in the proceedings could contend, relying on article 59 of the ICJ Statute, that they are not obliged to recognize the findings of the Court on the nature of the statement and thus are not forced to submit to the reservation regime which requires an objection to avoid the opposability of a reservation.

Although the Vienna Convention has been in force since January 1980 and considering that according to the rules of non-retroactivity under article 4 it applies at the present moment only to a limited number of treaties, international legal publicists and judges have argued as though the rules on reservations form a part of international customary law. It is doubtful if this is correct with respect to certain of the rules of the Vienna Convention regime. The presumption of the minimum effect of objections is a clear example of progressive development. The presumption of maximum effect was upheld to the very end of the Vienna Conference by the majority of the negotiating states. The reversal of the presumption came as a surprise. The 1977 arbitration

between France and the United Kingdom shunned the problem of retroactivity by stating that article 12 of the Continental Shelf Convention was sufficiently clear as concerns the effects of reservations and objections. In fact article 12 says nothing about the legal effect of reservations or objections.¹⁴ The tribunal decided to apply the minimum effect formula, though this was not generally recognized at the time that France presented its statement and the UK its disapproval. The construction of acceptance after 12 months of silence is equally a case of progressive development. During the preparatory work there had been proposals for varying lengths of time. Reservation clauses in treaties did not provide a consistent picture. Therefore much prudence must be shown when trying to adopt the Vienna Convention rules in situations where it is not formally applicable. There are however practical reasons that favour an adoption of these rules as opposed to the rule of unanimity. This is shown by the solution to the problem that was created by the UK objections to a number of statements to the 1936 Convention Concerning the Broadcasting for Peace. It seems as if there is a certain reluctance to raising the matter of the temporal application of the unanimity rule.

The solutions proposed in the present would depend very much on the writer's conception of international law as a norm system. It is submitted that the rules on international law do not form an all-embracing, closed system, where each act can be clearly referred to the categories of ordered, permitted or prohibited acts. Although there is inherent in each legal system a tendency to bring all acts under these categories, we have to recognize that there is especially in the sphere of international relations, a grey zone where we will not be able to determine with certainty the legal status of an act.¹⁵ Many views will be presented that such an act may be referred to one or the other category, but none of them will have the required authority to establish this as the correct one. Common consent by formal agreement or acquiescence expressed by concluding acts will provide such authoritative proof. Judgements by international tribunals will due to their lack of precedential value constitute only an argument. However, this argument is a powerful one that tends to be recognized by states.

NOTES

NOTES TO CHAPTER 1

1. A confronted state may consider it wise not to present an objection, where the reserving state informs that it will undertake some counter-measures in the case of an objection.
2. Scelle I, p. 10ff.; see also McDougal, *Studies*, pp. 171 and 276; Scelle, *Phénomène*, p. 324.
3. Multilateral Treaties Deposited with the Secretary-General. Status as at 31 December 1985 (to be cited as MT 1985).
4. Thirlway (pp. 117–124) treats the question of reservations to provisions that are considered to codify rules of international custom. As to the question of parliament's right to accept or reject reservations formulated by other states see 60 AJIL 1966, pp. 563–564: "US Contemporary Practice Relating to International Law, Reservations by other States – Submission to Senate". The problem was up for consideration in the US Senate on giving its consent to the 1949 Geneva Conventions for the Protection of War Victims, Senate Executives D-G, 82nd Congress, 1st session, p. A 2. When the question arises as to the need for Senate consent to reservations that have been communicated after the US ratification of a treaty, consultations will be held between the Department of State and the Senate Committee on Foreign Relations.
5. ILC Final Draft on the Law of Treaties, Vienna Conference, Documents, p. 23. See also amendment by France A/CONF.39/C.1/L.169 and Corr 1, p. 133. Whiteman (p. 19) accepts the possibility of reservations to bilateral treaties. If one accepts that reservations intend to modify a treaty as adopted on signature, they appear to be possible to bilateral treaties. Hence reservations would only appear on ratification. However if one believes that reservations introduce norm systems alongside a norm system that may be termed 'original' or 'normal', reservations would not be possible to bilateral treaties.
6. Amendment by China (A/CONF.39/C.1/L.13), amendment by Chile (A/CONF.39/C.1/L.22) and amendment by Hungary (A/CONF.39/C.1/L.23), Vienna Conference, Documents, p. 112.
7. The amendments were deferred to the Drafting Committee but were not maintained. The reason for this was according to the President of the Drafting Committee the wish not to prejudice the question of reservations to bilateral treaties. Vienna Conference, 2nd Session, Yasseen, chairman of the Drafting Committee p. 28 (P1M 10:23) and p. 37 (P1M 11:23) as well as Ago, President of the Plenary Meeting p. 37 (11:24). See also Ruda, *Reservations*, pp. 109–110; Nieto Navia, p. 4. La Guardia & Delpech considered this outcome to be regrettable (p. 253).
8. Rousseau, DIP 1944, p. 298; Paredes, p. 389; O'Connell I, p. 232.
9. Glennon (p. 265) considers, referring to contract law, that the act of exchanging instruments of ratification implies the acceptance of the counter-offer – reservation. He admits though that due to the absence of authoritative views the matter is not free from doubt. States often try to have their views or conditions recognized in a binding way by the other contracting states. This could be done in the form of an amendment or a reservation, both are similarly binding. It is assumed however that a reservation is not as easily rejected as an amendment (Glennon, p. 259).
10. Fischer, p. 763. The official US view was that the Carter-Torrijos Joint Statement of Understanding of 14 October 1977 had been duly made public before the Panamanian plebiscite and thus obviously approved of in the same way as the treaties. According to the statement the US may independently determine if there is any threat to the free transit through the Canal which requires for military measures. Within the US Senate there was some support for having the statement become an integral part of the treaties by way of amendment. *Digest of US Practice* 1978, pp. 689–694, 729–734.

NOTES TO CHAPTER 2

1. Pomme de Mirimonde, Washington, p. 196; see also Bishop, Reservations, p. 261, Rousseau, DIP 1944, p. 294, Detter, p. 47 and Talalaev, p. 77. The idea that a reservation to a treaty is simply a rejection of the original offer and the presentation of a new one was already introduced by Rivier (p. 84).
2. Miller, p. 5. For a presentation of the Jay Treaty incident see Josephy, p. 101.
3. Gubin divides the history of reservations into four phases: The first leading up to 1871, the year of the Paris Commune, the second lasting from 1871 to 1917, the year of the October Revolution, the third covering the League of Nations period and the fourth covering the time after WW II (Sovetskii, p. 127; Voznikovenie, p. 236 ff.).
4. The Hague Conventions and Declarations of 1899 and 1907, ed. James Brown Scott, Carnegie Endowment for International Peace (cited as Scott) pp. 236–237; Gamble, John King, Reservations to Multilateral Treaties: A Macroscopic View of State Practice, 54 AJIL 1980, pp. 372–394; Lachs, p. 297; Imbert, Réserves, pp. 329–338 and 420–429. On Soviet reservation practice see Gubin (Sovetskii, p. 136). A critical evaluation of this presentation is given by Göttling (pp. 104–105).
5. Scott, pp. 236–239, For reservations of a more recent date see Bardonnnet, pp. 734–737; Marin, pp. 743–744.
6. Thus for example Frangulis, p. 61; Hoijer I, p. 50; Kappeler, Réserves, p. 6; Khadjenouri, p. 90, Pomme de Mirimonde, Traités imparfaits, pp. 44–45. Fauchille (Traité p. 313) speaks about 61 reservations, Raschhofer (p. 232) of 60 reservations. See also the statements by Gottlieb and Morozov, UNGA 1950, 5th Session, VIth Committee, p. 69 (223:6, i.e., 223rd meeting para. 6) and p. 61 (222:24). Scott lists 8 reservations to the Conventions of the 1st Peace Conference and 67 reservations to the Conventions of the 2nd Peace Conference.
7. The terms may be clarified in the following way:

<i>action</i> ↓ statement: a) reservation b) declaration	approval: a) acceptance b) acceptance	<i>reaction</i> ↙ ↘ disapproval: a) objection b) protest
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8. Scott, p. 218.
9. Ibid., p. 218.
10. Pomme de Mirimonde, Traités imparfaits, pp. 31 and 48; Khadjenouri, however (p. 91) seemed to consider statements to article 53 to be reservations as they “sont de nature à affaiblir la convention, car il s’agit là d’une disposition nouvelle essentielle”.
11. See art. 53(1). The United States did not consider the statement to be of a modifying kind as it appears from the wording of the US statement to the Convention (Scott, p. 65). The competence of the Permanent Court to settle the compromis on the request of only one party is excluded if the other party declares that the dispute is of the kind not to be submitted to compulsory arbitration. The provision does not state when such a declaration may be made.
12. There may always be divergencies of views as to the nature of a statement. This is for example proved by the above-mentioned statements to article 53 of the Hague (I) Convention, in this work considered to be declarations. A formal reaction may be chosen out of prudence, though it would not be obligatory. See *infra* the example of the Hungarian statement, ch. 25.8.2. in fine.
13. Thus for example Lachs holds that reservations “... are the result of the introduction of the majority rule for the adoption of treaties in international conferences. Reservations were unnecessary were treaties were adopted unanimously (Lachs, p. 297). See also Park (p. 337) who sees the practice of making reservations to result from both the increasing power of parliaments and the adoption of treaties by majority votes.
14. Brownlie, pp. 10–11.
15. There is though disagreement as to whether this holds true without exceptions. See for example O’Connell I, p. 20.
16. D’Amato, Concept, p. 268.

17. *Ibid.*, pp. 56ff. and 52–53.
18. The classical definition of international custom is to be found in ILCYB 1950:1, p. 26, Manley O. Hudson. See also d'Amato, Concept, p. 7.
19. Because of the difficulty of proving the presence of *opinio juris* some writers have preferred to abandon or downgrade this criterion. Guggenheim, *Völkerrecht*, pp. 45–48, though he later modified his view (see *Traité*, p. 104); Quadri (1963), p. 95; Reuter, *DIP*, pp. 70–71. Cheng (36) states that *opinio juris* "... is intended to mean not so much the mental process or inner motive of a State when it performs or abstains from certain acts, but rather the acceptance or recognition of, or acquiescence in, the binding character of the rule in question implied in a State's action or omission" (emphasis added). Usage is according to Cheng only evidentiary of *opinio juris*. "Consequently, international customary law has in reality only one constitutive element, the *opinio juris*.
 Chaumont (p. 440) states that international custom and treaties are actually based on agreement, which has to be established.
20. Tunkin, *Völkerrecht*, p. 74; Tunkin, *Theory*, p. 115; Baxter, *Treaties*, p. 67; Verdross, p. 85 and Akehurst, p. 16. Other writers do not seem to recognize that international custom may be crystallized within a short time. DeVisscher, *Théorie*, p. 174; O'Connell I, p. 26. See also the *North Sea Continental Shelf* case, ICJ Reports 1969, p. 43 para 74.
21. It took 20 years to elaborate and adopt the Vienna Convention and 15 years for the 1982 Law of the Sea Convention.
22. There were more than 160 negotiating parties at the final Law of the Sea Conference.
23. Lachs, p. 296; UNGAOR 1950, 5th Session, VIth Committee, pp. 46–47 (220:8–9).
24. *Ibid.*, pp. 47–48 (220:9 and 10).
25. UNGAOR 1950, 5th Session, p. 67 (223:2)
26. A modified consensus system was applied. In the case where consensus could not be reached decisions were to be taken by 2/3 majority vote. See UN Doc. A/37/163, Draft Standard Rules of Procedure for United Nations Conferences, Report by the Secretary-General, Annex p. 24, rules 51 and 53.
27. The vote on specific articles was taken by 2/3 majority, but on the entire text by unanimity.
28. See e.g. Review of the Multilateral Treaty-Making Process. Report of the Secretary-General, UN Doc. A/35/312/Add.1, 28 August 1980, p. 25 para. 20; McDorman, pp 486–487.
29. Hazou, pp. 81–83. Flexibility of application was to be provided by the treaty itself. Oxman, UNCLOS 8th Session, p. 35. See also McDorman's comment on the matter, p. 493 and n. 49.
30. Detter, p. 249; Bishop, *Reservations*, p. 263.
31. Henkin, *How Nations*, pp. 133–135, see also p. 90. If the President is not satisfied with a reservation attached to the consent of the Senate, he may return the treaty to the Senate for further explanation and for further consideration or he may simply fail to execute ratification. Thus a reservation cannot be formulated without the consent of both the Senate and the President (Whiteman, p. 137).
32. For France see Kiss I, p. 237, paras. 456 and 457, for earlier French practice see Pomme de Mirimonde, Washington, p. 201, who however mentions some exceptions to the rule; for Finland see Kaira, p. 257. Paragraph 33 of the Finnish Constitution does not prohibit parliament to give its consent to a treaty on the condition of amendments to be made, but Finnish legal doctrine does not consider it possible, see also Hidén & Saraviita, p. 182; for Italy see Monaco, pp. 75–76, Cassese, *Parliamentary*, p. 168; for the FRG see Jarass, pp. 121–122 and Treviranus, p. 327; for Japan see Orita, p. 62; for Spain Espada Ramos, p. 24. For Dutch practice see Sondaal, pp. 139–141. The Second Chamber cannot demand amendments to a treaty where reservations are not permitted. The rule is that government and parliament must come to an agreement as to the need for a reservation. Parliament may abstain from giving its consent to the treaty if the government does not share its view as to the formulation of an own reservation or as to the reaction towards a foreign reservation. The government again may abstain from ratifying if parliament insists on a reservation the government can't approve. In the Soviet Union there is not admitted to be any divergence between the treaty-making organs, Götting, p. 112, Triska, p. 65.
33. Henkin, *How Nations*, p. 134; Corwin, p. 168. Corwin refers to the Buchanan type presidents which use the presidential prerogatives restrictively and the Lincoln type presidents which use it extensively, p. 148ff.
34. On ratifying the 1953 Convention on the Political Rights of Women and the 1979 Convention

- on the Elimination of All Forms of Discrimination against Women, Sweden did not consider it necessary to formulate any reservation with respect to military appointments as did Denmark and some other states. See *infra* ch. 25.1.J.
35. Inter-American Juridical Committee: Reservation of Theoretical Adherence to Multilateral Treaties. Report proposed in accordance with Resolution XI of the 4th Meeting of Inter-American Council of Jurists; Pan American Union, Washington D.C. February 1960 (OEA/Ser. 1/VI.2 CIJ-57).
 36. *Op.cit.*, pp. 4–5.
 37. For example the 1955 European Convention on Establishment art. 26(2), ETS 19, ECA 1, p. 125. In the *Temeltasch* case however it was held that the obligation was not absolute.
 38. Gubin, *Sovetskii* p. 141; Kuznetsov, pp. 373–374; Schweisfurth, p. 258; Triska, p. 87. Similarly Filippov (pp. 8–10); Gubin reasons that the efforts of the Western capitalistic countries to create a single economic market in the second half of the last century caused the rise of the institution of reservations (*Vosnilovenie* p. 236).
 39. The socialist states together with states of the Third World nowadays constitute the majority at international conferences.
 40. Gamble, *Reservations*, pp. 392–393.
 41. *Ibid.*, p. 392.
 42. *Ibid.*, p. 392.

NOTES TO CHAPTER 3

1. Gould & Barkun, pp. 189–190.
2. *Ibid.*, p. 189.
3. Pillet, p. 84, pp. 87–89.
4. Miller, David Hunter, *Reservations to Multilateral Treaties*, Washington 1919.
5. LoN OJ, July 1927, p. 880; 81 LNTS 350, Hudson IL, Vol. II, p. 1120.
6. LoN OJ, July 1927, p. 880.
7. The subcommittee consisted of Fromageot, Diena, Guerrero, Mastny and Brierly. The latter was later replaced by McNair.
8. Document C.266.(2) 1927.V., LoN OJ, July 1927, pp. 800–801.
9. Resolution as of 25 September 1931, LoN OJ, October 1931, pp. 10–11.
10. For the Pan-American reservation regime see *infra* ch. 4.4.2. and ch. 28.3.1.
11. UN Doc. A/1372, Report of the Secretary, UNGA Official Records, 5th Session, Agenda item 56, Annexes p. 3. ICJ Pleadings, Oral Arguments, Documents; Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, (cited as Pleadings) p. 310, Statement by Kerno.
12. Pleadings p. 98, Written Statement of the United Nations.
13. *Ibid.*, p. 320, Statement by Kerno.
14. These states were: Ecuador, Guatemala, El Salvador, Australia, the United Kingdom, France, Cambodia and Viet Nam.
15. UN Doc. A/1372, p. 8, UNGA 5th Session Annexes, p. 8; Pleadings, p. 316, Statement by Kerno.
16. Pleadings, pp. 95 and 98.
17. UN Doc. A/1372, pp. 3–4.
18. The following expressions had been used: *Ecuador*, “is not in agreement with these reservations and that they therefore do not apply to Ecuador”; *Guatemala*, “is not in agreement with the reservations” and “it should not be inferred that this Government accepts them merely because it did not make any reference to them in depositing its instrument of ratification”; *El Salvador*, “does not wish to make objections to those reservations, but it expresses its complete disagreement with them, in particular those relating to articles IX and XII of the Convention”; *United Kingdom*, “unable to accept the above-mentioned reservations because in their view the effect of these reservations would be to alter in important respects the Convention” and “cannot therefore be regarded as valid any ratification of the Convention maintaining such reservations”; *France*, “est que les réserves formulées par un Etat lors de la signature ou de la ratification d’une convention ou de son adhésion à celle-ci ne sont pas opposables à une partie contractante qu’après avoir fait l’objet d’un accord formel de sa part. L’absence d’observations du Gouvernement français aux réserves formulées par certains Etats ne saurait donc dans les cas présent être considérée comme une acceptation desdites réserves”; *Cambodia*, “adhère purement à cette convention sans tenir compte des réserves faites par les représentants des pays précités”; *Vietnam*, “éstime n’avoir pas pour le moment à donner son opinion sur la valeur des réserves exprimées par les Etats intéressés.”
19. Guatemala by declaring that only the clauses covered by the reservations would be affected in its relations with the declaring state, was obviously applying the Pan-American rules. The perplexity which this caused within the Secretariat was one of the reasons to bring the matter to the General Assembly (Cox, p. 27). See also p. 19 n. 44.
20. This criticism came on the first hand from the Soviet Union, Pleadings, p. 104, Annexed Documents 74 and 76, pp. 158 and 159.
21. Resolution 16(XI) 1950, adopted by the General Assembly at its 305th Plenary Meeting on 16 November 1950.
22. ICJ Reports 1951, p. 25.
23. See ch. 3.
24. The Court used as an argument the concession by the Secretary-General that “there had been no certainty as to the procedure to be followed by the depositary in obtaining the necessary

- consent or as to the legal effect of the States' objecting to the reservation", (ICJ Reports 1951, p. 25, UN Doc. A/1372, para. 2, Pleadings, p. 312, Statement by Kerno). But this does not actually prove the non-existence of a rule on reservations. A rule may exist even if there are doubts as to its correct application. The situation is similar with the various rules on the invalidity of treaties or the effects of a breach on the operation of a treaty. There may well exist a rule on unanimous acceptance of a reservation even if there are doubts as to whether an objection nullifies only the reservation or the whole instrument of ratification.
24. Harvard Draft on the Law of Treaties (to be cited as Harvard Draft), p. 847.
 25. *Ibid.*, p. 848.
 26. *Ibid.*, pp. 876, 878, 879, 894, 896–898.
 27. Usually the term 'non-reserving' state has been used. This term is not quite satisfactory because a state not having formulated the relevant reservation may well have presented another one. A 'confronted' state is a state which is confronted with a reservation it has not formulated itself irrespective of whether it has or has not formulated some other reservation.
 28. Harvard Draft, p. 876; Miller, pp. 113–114.
 29. Malkin, pp. 151–152; Harvard Draft, pp. 875–878. Germany wanted to secure for diplomatic and consular officers the right under certain conditions to execute directly *commissions rogatoires*.
 30. Harvard Draft, p. 875.
 31. Temperley IV, p. 388. For a background description of the Chinese question see Elliott, pp. 687–737. The US was not in favour of the provisions in the Versailles Treaty relating to the succession by Japan to German rights in the Shantung area.
 32. Ruda, *Reservas*, p. 19ff; Holloway, *Réserves*, pp. 117–122; UN Doc A/1372, p. 3. See also Ruda, *Reservations*, p. 116; Coccia, p. 5.
 33. LoN OJ, July 1927, p. 758 par. 1941. Great Britain, Monaco, Switzerland and the Netherlands declared that they would follow the opinion of the Opium Advisory Committee to be given in the matter (LoN OJ, July 1927, pp. 817–819; July 27, p. 981; SdN JO, Août 1927, p. 981). Cuba, Italy and Egypt clearly objected to the reservation (LoN OJ, July 1927, pp. 817, 818, SdN JO, Février 1929, p. 315). Other states like Austria, Japan, Czechoslovakia, The Free City of Danzig, Australia, Greece and Hungary declared that they had no objections to make towards the reservation or that they had no opinion in the matter (SdN JO, Août 1927, pp. 980, 981; Septembre 1927, p. 1080; Février 1929, p. 315). South Africa accepted the reservation (LoN OJ, 1927 p. 816).
 34. LoN OJ, July 1927, pp. 758–816, C.269.1927.XI.
 35. SdN JO, Février 1928, pp. 204–205; Juillet 1928, pp. 1086–1087.
 36. SdN JO, Janvier 1931, p. 5; SÖ 1931:2; 104 LNTS 516.
 37. Harvard Draft, p. 904; Hudson, *Reservations*, pp. 590–594.
 38. SdN JO, Juillet 1927, p. 822; Septembre 1927, p. 1068; Août 1927, p. 963 n. 3, SdN JO, Mai 1929, p. 786, Juillet 1929, p. 982.
 39. SdN JO, Juillet 1927, p. 822.
 40. SdN JO, Septembre 1930, p. 1138.
 41. 130 LNTS 444; Harvard Draft, pp. 910–911; Hudson IL III, p. 2010, Hudson, *Cuban Reservation*, pp. 593–594.
 42. *Ibid.*, p. 911.
 43. The statement would appear more to be an interpretative declaration, SdN JO, Août 1927, p. 982.
 44. Sanders, p. 491. Chile apparently applied the Pan-American system though the Convention elaborated under the auspices of the League of Nations should not have been governed by that regime.
 45. Göttling, p. 172.
 46. *Ibid.*, p. 491; Hudson, *Reservations*, pp. 333–334.
 47. UN Doc A/1372, pp. 3–4.
 48. MT 1985 p. 295 n.5. This statement is actually no reservation, though it has been frequently considered as such. See Saba, pp. 430–431.
 49. UN Doc A/1372, p. 4 para 14.
 50. *Ibid.*, p. 4 para 15.
 51. Fitzmaurice, *Reservations*, pp. 16–22; July, p. 274; Holloway, *Réserves*, pp. 182–184.; Anand, pp. 89–91; ILCYB 1951:I, Díez de Velasco, El sexto, p. 1089; El Khoury, p. 171 (102:63); Briery p. 169 (102:16).

Curiously enough the two Latin American judges of the Court, Guerrero and Alvarez were opposed to applying the Pan-American flexible rule to the present case.

52. The discussion on the reservation to the 1949 Geneva Conventions on the humanitarian law of war as well as on possible statements by the US on ratifying the 1925 Gas Protocol was founded on the assumption that the unanimity rule would not apply.
53. MT 1985 pp. 768–771; see *infra* ch. 28.2.4. In 1985 the UK denounced the treaty and therefore considered it not worthwhile to react on the latest statements.
54. See the discussions at the 102nd meeting of the ILC, ILCYB 1951:I, pp. 168–186.
55. ILCYB 1953:II, pp. 123–124.
56. *Ibid.*, pp. 123–124.
57. *Ibid.*, p. 124; ILCYB 1954:II, p. 131.
58. ILCYB 1956:II, p. 115.
59. ILCYB 1962:II, pp. 60–68, especially at p. 63.
60. Holloway, *Réserves*, pp. 114 and 183; Dehaussy, *Dépositaire*, p. 516. Even official handbooks on treaty law subscribed to the view that reservations had to be accepted by all the interested states. See for example the Handbook of the Dutch Foreign Ministry (*Totstandkoming*, p. 25).

NOTES TO CHAPTER 4

1. Kröger, pp. 208–209.
2. Kellogg, p. 709; 4 AILC 423, Quadri (4th ed. 1963), p. 123, (5th ed. 1968) p. 163, Bustamante (pp. 113–115) stressed the contractual element in his definition of reservations. See also ch. 2 n. 1.
3. ILCYB 1950:I, p. 209(105:2); ILCYB 1951:I, Amado p. 181(103:48–49), Brierly p. 195 (105:2), El Khoury p. 205(106:16), Cordova p. 207(106:40), Sandström p. 208(106:74), Hudson p. 209(106:54); Amado UN Doc. A/CN.4/L.9 p. 19, ILCYB 1951:II, pp. 17–23.
4. Owen, p. 1094.
5. Sohm, p. 74.
6. Buckland, p. 450.
7. ILCYB 1951:I, Yepes pp. 160–161(101:14–15) and p. 179(103:18), Alfaro p. 204(106:6).
8. Koh, p. 83. The subjective element expressed by the unanimity rule does not guarantee the objective criterion of complete integrity.
9. Reservations to human rights treaties have seldom met with objections. See *infra* ch. 23.3. There seems to be a slight increase of objections more lately. Reservations to the 1979 Convention against Discrimination of Women have during 1985 met with 11 objections, i.e., by Mexico and the FRG against statements of 7 states.
10. The US presented a general objection on ratification 2 August 1955; Australia, New Zealand and the United Kingdom objected on ratification to certain reservations entered into by socialist states.
11. Pillet, p. 80; Pilloud hoped that reservations would be withdrawn, Pilloud, Reservations, p. 187.
12. Malkin, p. 159; Harvard Draft, p. 878; Owen, pp. 1086, 1096–1097. See the Final Protocol to the International Radiotelegraphic Convention of July 1912, 1 LNTS 148.
13. Malkin, p. 160; Harvard Draft, p. 879; Bishop, Reservations, p. 273. Concerning the Protocol of Deposit of Ratification from 2 January 1892 to the 1890 Brussels General Act Relating to African Slave Trade.
14. Owen, p. 1113.
15. ILCYB 1950:I, pp. 198–203(106:36–137).
16. ILCYB 1962:II, p. 66; ICJ Reports 1951, p. 21.
17. This was the opinion of France and Guatemala in the pleadings before the ICJ, Pleadings, p. 191, Annexed Doc. 132 and p. 163, Annexed Doc. 80. See also El Khoury, ILCYB 1951:I, p. 198(105:42). See *infra* p. 125 n. 19.
18. Anand, p. 86; Lauterpacht, p. 99; Fitzmaurice, Reservations, p. 15ff. See also the UK statement, Pleadings, p. 57. The assertion that treaties constitute balanced wholes has been questioned *inter alia* by Simma (p. 54). Simma makes the distinction between the formal balance of rights and obligations and the factual balance between benefits and burdens. The latter balance may be guaranteed by the former, but there are many exceptions. See also Modinos, p. 70. Treaties are often clearly disadvantageous for one party in a material way though they are formally distributing rights and obligations equally between the parties. One treaty may be both formally and materially disadvantageous to one party, but this may be remedied by another treaty which is quite favourable to that same party. If a state is unfairly treated may be only determined by looking at the sum of interrelated treaties. (Simma, p. 234).
19. The so-called unequal treaties would be an example of treaties where such a balance is absent.
20. Thus for example Scelle expressed the view that negotiating states as “*legislateurs originaires*” were to have a privileged position. ILCYB 1951:II, p. 25. UN Doc. A/CN.4/L.14, pp. 23–26.
21. It appears strange that one was ready to accept numerous reservations at the time of signature as was the case with the Conventions of the Hague Peace Conference. Further does the liberal practice of providing for tacit acceptance not harmonize with the concern for the integrity of the treaty. (Rousseau, DIP 1944, p. 292). Ratification does not imply acceptance of reservations formulated by other contracting parties. States later acceding were not considered to have the right to object to reservations that had been formulated by the negotiating states and presented on signature.

22. The Austrian reservation to the 1925 Opium Convention was such an unwelcome reservation that was presented by a state which had not participated in the negotiations but which had been invited to sign the treaty within a certain period, Pomme de Mirimonde, (Washington, p. 197) and Rousseau (DIP 1944, p. 292) considered reservations after signature to be disturbing.
23. Czerwinski, chapters 2 and 3. See the discussions in the ILC on the right of participation in so-called general multilateral treaties in ILCYB 1959:I, pp. 103–115(502–504 meetings), ILCYB 1965:II, pp. 13–14, 26–30.
24. Vienna Conference, 2nd Session, pp. 229–232(CWh 88th – 91st meetings), pp. 343–344 (CWh 101:2–10).
25. See the discussions at the 651st meeting of the ILC, ILCYB 1962:I, pp. 139ff.
26. ICJ Reports 1951, p. 23–24.
27. Ibid., p. 26.
28. A/CONF.39/CL.74 and Add.1 and 2.
29. Czerwinski, pp. 118–134.
30. This was within the ILC the view of the United Kingdom and Luxembourg. ILCYB 1965:II, pp. 26–27.
31. ILCYB 1962:I, p. 214(661:27).
32. UN Conference on the Law of Treaties, 2nd Session (A/CONF.39/11 Add.1), Hu, Rep. of China p. 232(CWh 88:28), Groepper, FRG p. 234(CWh 88:42–47), Galindo-Pohl, El Salvador p. 237(CWh 89:8–11), Sinclair, UK p. 239(CWh 89:32–33), Francis, Jamaica p. 240(CWh 89:47), Hubert, France p. 242(CWh 89:59), Tsuruoka, Japan p. 245(CWh 90:27), Yrjölä, Finland p. 246(CWh 90:29), Kearney, USA p. 246(CWh 90:36), Fattal, Lebanon p. 249(CWh 91:4), Maresca, Italy p. 250(CWh 91:12) and La Guardia, Argentina p. 251(CWh 91:16).
33. Thus for example Nascimento e Silva, Brazil p. 236(CWh 88:62).
34. Ibid., p. 344(105:10).
35. Ibid., Wyzner, Poland p. 229(CWh 88:2–3).
36. Vienna Conference, 1st Session. Khlestov p. 107(CWh 21:2).
37. See chs. 4.4.2. and 28.3.1.
38. Gamble's study concerns treaties in the League of Nations Treaty Series (LNTS) and the United Nations Treaty Series (UNTS) which entered into force between 1919 and 1971 (op.cit. p. 378).
39. ILCYB 1951:I, Amado p. 181(103:48–50), Alfaro p. 182(103:65), Hudson p. 182(103:68). See also Córdova p. 183(103:87), who however was in favour of the Pan-American regime. See further Julliy, p. 262, Liang, Third Session, pp. 495–496.
40. IATC A-2, p. 4; A-32, p. 65; A-43, p. 93, B-27, p. 172. The abundance of reservations was probably the reason for the United States to abstain from ratification of the Economic Agreement of Bogotá, Whiteman, p. 157.
41. Gamble, Reservations, pp. 378–379.
42. The period of uncertainty about which of the alternative regimes was to prevail lasted more than ten years. In 1962 the ILC was ready to opt for a flexible regime in accordance with the First Report on the Law of Treaties by Waldock (UN Doc. A/CN.4/144).
43. UNGA Resolution 32/48 of 8 December 1977.
44. See also UNITAR study: Towards a Wider Acceptance of United Nations Treaties, ed. O. Schachter, M. Nawaz and J. Fried. See especially Chapter III on International Measures to Foster Acceptances. See further UN Doc. A/35/312, p. 34. A wider resort to reporting concerning steps towards ratification is proposed. UN Doc. A/C.6/37/L.29 mentions among other things a system of advisory services for translation and drafting implementing legislation. The problem of fostering the adoption and implementation of treaties appears to be an eternal question. See for example Hurst's article in the Grotius Transactions from 1946.
45. Fitzmaurice, Reservations, pp. 20–21.
46. Triska, p. 83; Göttling, p. 60ff.
47. According to Chiu (p. 47) there had been no official statements nor any writings of Communist Chinese discussing the matter. It is however assumed that the views of the Soviet Union have been shared.
48. Kozhevnikov in Durdenevskii & Krylov, MP 1947, p. 389; Apparently also Kozhevnikov in Korovin, p. 409; Polents, p. 28; Durdenevskii, Soglasie, pp. 96, 98, 102; also in Ost-Europa Recht, p. 1141. Kozhevnikov, Polents and Durdenevskii writing in the pre-Reservations case period followed the traditional view that reservations required the acceptance of the other

- parties. See also Lapenna, pp. 276–277; Triska, p. 87; Schweisfurth, pp. 252–253 and Göttling, pp. 58–59.
49. UNGAOR A/C.6/SR 220–223, Morozov, SU p. 60(222:16 and 18), Lachs, Poland pp. 60 and 80(220:13 and 224:34), Gottlieb, Czechoslovakia p. 67(223:1) and Khomusko, Byelorussia p. 70(223:35–36). This view was not shared by Bartos, Yugoslavia p. 56 (221:31).
 50. Borisov, p. 69; Filippov, p. 46; Gubin, Sovetskii, p. 132; Juridicheskii Slovar 1956, p. 33.
 51. Talalaev, p. 86; Schweisfurth, pp. 258–259; Triska, p. 8.
 52. Gubin, Sovetskii, p. 141; Schweisfurth, p. 258.
 53. Göttling, pp. 56–78; UNGAOR A/C.6/222 p. 60 – A/1372; UNGAOR A/C.6/SR 269, p. 100, Morozov rejects the Pan-American rules from 1932; Pleadings p. 21.
 54. Pleadings, p. 21, Exposé écrit du Gouvernement de l'Union des Républiques Socialistes Soviétiques – le 13 janvier 1951, p. 292. Written Statement by the Government of the Ukrainian Soviet Socialist Republic – 20 January 1951.
 55. Ibid., p. 294. Exposé écrit du Gouvernement de la République Socialiste Soviétique de la Biélorussie – 22 janvier 1951; p. 290, Exposé écrit du Gouvernement de la République Populaire de Roumanie.
 56. Ibid., p. 287. Exposé écrit du Gouvernement de Tchécoslovaquie – le 20 janvier 1951.
 57. See *infra* ch. 6.1.
 58. UNGAOR A/C.6/SR 222 p. 60 (222:16–18).
 59. Anand, p. 86; Lauterpacht, p. 104; Fitzmaurice, *The Law*, p. 276.
 60. Borisov, pp. 68–69; Juridicheskii slovar, p. 33; Durdenevskii, *K voprosu*, p. 99.
 61. Borisov, p. 69; Juridicheskii slovar, p. 34.
 62. Kozhevnikov, *Nekotorye*, p. 71.
 63. Durdenevskii, *K voprosu*, p. 100.
 64. Filippov, p. 49; Shurshalov, pp. 177–179.
 65. Kuznetsov, p. 381.
 66. Tunkin, *Völkerrecht*, p. 67.
 67. Third Draft, UNECOSOC E/CN 7/AC 3/9, 11 September 1985, p. 81.
 68. ILCYB 1962:I, Tunkin p. 156(653:26). Kozhevnikov (MP 1957 p. 265) argued that contracting states may make objections, but seems to consider that they actually have no different effect from an acceptance.
 69. When there are some special reservation regimes socialist states may not insist on the principal “right to make” reservations, the SU abandoned a reservation to the Constitution of the ILO once the Director General informed it about the restrictive practice of the ILO with respect to reservations. Bracht, p. 143; Göttling, p. 86.
 70. For the text of the treaty see 1st Report of Brierly on the Law of Treaties, UN Doc. A/CN.4/23, Appendix B, ILCYB 1950:II, pp. 244–245.
 71. See chapter 12. Correspondingly there is no claim-right for the confronted states as to the integral application of the treaty nor of the reserving state as to the recognition of the legal effects of the reservation. Fitzmaurice though considered that the Pan-American regime did not differ from the sovereignty rule (Reservations, p. 16).
 72. Anand, p. 87; Reuter, *Introduction*, p. 92; Chaumont, p. 447.
 73. Thus for example Holloway, *Réserves*, p. 188; v. Crayen, p. 27f.; Pleadings, p. 428, Exposé écrit de M. Rousseau. See also Neuhold, p. 67.
 74. The Pan-American reservation regime was originally based on the first solution (the maximum effect of the objection), but has been modified to provide an option for the second solution (minimum effect of the objection) and has finally in 1973 been altered so as to establish a presumption for the second solution with the possibility to opt for the first.
 75. This is quite a hypothetical case, but it has occasionally been referred to. See *infra* pp. 342–343; UNJYB 1976 p. 213.
 76. Within the Pan-American system a reservation is notified to all American states irrespective of their status with respect to the treaty.
 77. For example the 1929 General Convention of Inter-American Conciliation; the 1936 Convention of Inter-American Cultural Relations; the 1964 Convention on Diplomatic Asylum and the 1981 Inter-American Convention on Extradition. The 1971 Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related to Extortion that are of International Significance, enters into force for each state on the date of deposit of ratification.

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78. The 1973 Standards on Reservations to Inter-American Multilateral Treaties (cited as Standards), Section C3. See ch. 28.3.1.
79. Pleadings, p. 191, Annexed doc. No. 132. Lettre du Ministère des Affaires Etrangères de France au Secrétaire Général le 6 décembre 1950. See also written statement of the French Government presented by Charles Rousseau to the Court, Pleadings, pp. 423–424. See p. 16 and n. 18.

The United States seemed to have taken a negative view on the construction of silence as tacit acceptance during the deliberations on the Pan-American reservation regime. US statement to resolution X of the Inter-American Council of Jurists in 1959. Final Act of the 4th Meeting of the Inter-American Council of Jurists in 1959, Santiago, Chile, 24 August – 9 September 1959 Pan American Union, Washington D.C. 1960 (CIJ-43) p. 86.

80. See *supra* ch. 4.2.

NOTES TO CHAPTER 5

1. During the discussions in the UN General Assembly in 1950 one representative was of the view that a definition of reservation was not required. UNGAOR A/C.6/SR 221 Kural p. 55(221:23).
2. The kind of definition one is to choose depends very much on the view the writer takes in the question of reservations. Either he intends his definition to be lexical and therefore descriptive of ordinary usage or it is intended to be a tool of rational investigation into the operation of certain legal phenomena. Whatever type of definition is chosen, both will have their limitations. One may never give a complete description of the use of a term. Nor will it be possible to state a stipulative definition so clearly that there never will arise any doubts as to what present and future phenomena will be covered by the term. In spite of these deficiencies which made Iavelanus state that "*omnis definitio ... periculosa est*" definitions cannot be eliminated (cited by Lloyd, p. 46). They guarantee a minimum of intellectual communication, but they will seldom provide complete certainty, instead they present different degrees of approximation.
3. Genet, p. 103.
4. *Ibid.*, pp. 101–102.

Scheidtmann stressed in deliberate contradistinction to Genet the importance of treating the concept of reservation as formal-technical and not as material (p. 21f.). What Scheidtmann exactly means is unclear. It is however evident that he wanted to mark his disagreement with the broad approach chosen by Genet, who for example had no doubts in accepting that a disagreement during treaty negotiations qualifies as a reservation. For Scheidtmann it was important that reservations were formally notified at the moment the final consent was given to the treaty and that they were in writing and clearly communicated to the other states. He underlined the importance of not mixing formal with material considerations. But on the other hand, he eagerly accepted the material characteristic of reservations as "angestrebte Vertragsänderungen" (p. 22).

5. Miller, p. 76; Cereti, pp. 8–9. Even Shatzky provides a broad concept (p. 216).
6. Anzilotti, p. 399.
7. Baldoni, p. 361; Hudson IL I, p. 1; Pomme de Mirimonde, *Traité imparfaits*, p. 17; Accioly, p. 400; Guggenheim, *Völkerrecht*, p. 77. See also Harvard Draft, p. 560.
8. Holloway, *Réserves*, p. 103 "diminuer et restreindre"; Hyde, p. 1435 "creating different relationships; Kraus, p. 380 "tendant à une modification"; Scheidtmann, p. 23 "im Augenblick des definitiven Abschlusses im Sinne der angestrebten Sonderstellung abzuändern versucht"; Podestá Costa, p. 16ff. "modifier" and p. 3 "modifier et exclure"; Rousseau, *DIP* 1944, p. 291 "exclure une disposition" and "en modifier la portée".
9. Scelle, *Précis*, p. 472; Khadjenouri, p. 12; Kappeler, *Réserves*, p. 16. Even Filippov seems to embrace the idea of a new and different legal regime. However he does not develop the idea further. He recognizes that reservations may be possible to bilateral treaties (pp. 10–11, 50).
10. Khadjenouri, pp. 18–19; Kappeler, *Réserves*, p. 27. Scelle's view is less pronounced: Reservations introduce "deux ou plusieurs régimes juridiques concentriques". He cannot accept reservations to "traités contrats" but well to a "traité-loi bilatéral" (*Précis*, p. 474).
11. See *infra* ch. 25.2.2. Filippov (p. 61ff.) is probably the only one who has considered the *clausula rebus sic stantibus* to be a kind of reservation. Gubin (Sovetskii, p. 128) criticizes Filippov for mixing together concepts.
12. Harvard Draft, p. 843; ALI Restatement, Foreign Relations Law, Tentative Draft No. 3 (1959) § 111 (cited in Gormley, *Influence*, p. 132).
13. *Ibid.*, § 127.
14. Kappeler, *Réserves*, p. 16; v. Crayen, p. 10; Kozhevnikov, *MP* 1964, p. 342; *Juridicheskii slovar*, p. 33, referred to in Grzybowski, p. 427.
15. The characterization of reservation as a "condition" is to be found in Waldock's First Report on the Law of Treaties (Doc A/CN.4/144), ILCYB 1962:II, p. 31. It does not appear in the Report of the Commission to the UNGA in 1962 (Doc. A/5209) ILCYB 1962:II, p. 163.

16. Tomuschat, p. 465; McRae, Legal Effect, p. 161. Case concerning the Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, Decision of 30 June 1977; Reports of International Arbitral Awards Vol. XVII, p. 40 at para. 55 (to be cited as *Anglo-French Continental Shelf* arbitration). See *infra* chs. 25.2.2. and 27.1.
17. Where a reservation could be presented at any time this would have a destabilizing effect on treaty relations. Pomme de Mirimonde, *Traités imparfaits*, p. 89; Pomme de Mirimonde, Washington, p. 204; Fauchille, *Traité*, p. 33; Scelle, *Précis*, pp. 478 and 629; Hoijer, pp. 146–147; Anzilotti, p. 400; v. Crayen, p. 82. See also ILCYB 1950:I, pp. 91 and 97, Scelle and Amado.
18. See ch. 24.1. Many of the francophone writers seemed also to refer unilateral interpretations to reservations.
19. See *supra* ch. 4.4.1., UNGAOR A/C.6/SR 219 Abdoh p. 45(219:48). Brandon (p. 434) regretted that the request for an advisory opinion of the ICJ in 1951 did not include the question what actually constitutes a 'reservation'.
20. ILCYB 1951:II, pp. 6–11.
21. Brierly's first report (Doc. A/CN.4/23); Fitzmaurice's first report (Doc.a/CN.4/101) ILCYB 1956:II, p. 110; Waldock's first report (Doc. A/CN.4/144) ILCYB 1962:II, p. 31.
22. ILCYB 1962:I, p. 124.
23. Vienna Conference, Documents, p. 7.
24. ILCYB 1966:II, p.178, UN Doc. A/6309/Rev. 1, Report of the International Law Commission on the Work of the Second Part of its 17th Session, Monaco 3–28 January 1966. Compare with the formulation from 1965, ILCYB 1965:II, p. 160, UN Doc. A/6009, Report of the International Law Commission on the Work of the First Part of its 17th Session, 3 May to 9 July 1965.
25. For the amendments to the definition of 'reservation' look Vienna Conference, Documents, p. 112. The term 'modify' had already been used in draft article 33, articles 35–38, to mention but a few examples.

NOTES TO CHAPTER 6

1. Hospers, p. 101; Weinberger, p. 250.
2. In *A System of Logic*, J.S. Mills conceives definitions as a) stipulative of new words, b) descriptive of linguistic usage and c) as an analysis of an idea into its constituent parts. See Appendix A "On Definition", pp. 1040–1056.
3. Jareborg, Begrepp, p. 83.
4. Weinberger, p. 271.
5. See *infra* p. 113 n. 14.
6. Jareborg, Begrepp, p. 84; Ryle, pp. 121–125; Larenz, p. 185.
7. The lexical definitions to be found in authoritative dictionaries in fact acquire the character of stipulative definitions. It is often felt that a dictionary does not only describe what the general use of a term is, but also prescribes that one should comply with this use.
8. Hart CL, p. 125.
9. Carnap's formalized language is construed on the basis of elementary observations.
10. Moore's analytical method strives to discover deeper truths through a clarification of language.
11. Jareborg, Begrepp, p. 84.
12. This clarification was inserted in the text due to the amendment of the United Kingdom, A/CONF.39/C.1/L.274. The Vienna Conference adopted it at its 18th Plenary Meeting on 6 May 1969.
13. The constant dilemma of the legislator formulating a legal instrument is that he has certain specific situations in mind, which he wants to have regulated by legal norms. It may happen that some of these situations never materialize and that there never arises any opportunity to implement the norm. On the other hand, problems and disputes arise which have not been foreseen but turn out to be of major importance.
14. Imbert, Réserves, p. 18. See also the more elaborate definition in Szafarz, *Zastrzeżenia*, p. 51 and *Reservations* pp. 294, 296.
15. See the ILC Draft Articles on the Law of Treaties between States and International Organizations or between International Organizations, UN Doc. A/37/10, ILCYB 1982:II, pp. 17, 35–37.
16. ALI Restatement of the Foreign Relations Law of the United States, Tentative Draft 1980 No. 1, p. 120; Whiteman, p. 137; Elias, p. 35; Nisot, pp. 200–201; Sinclair VC II, p. 51.
17. Vienna Conference, 2nd Session, p. 4(P1M 7:16).
18. This happened as a result of the debate during the 1965 Session of the ILC. See ILCYB 1965:I, the 777th meeting (pp. 9–16).
19. The Pan-American concept of reservation can still be said to differ from the one under the Vienna Convention although the reservation rules have been brought in line with the Vienna rules. The Pan-American regime does not accept the criterion of compatibility. See *infra* ch. 28.3.1.
20. See Abelson's presentation on 'definition' in *Encyclopedia of Philosophy*, Vol. 2, p. 314ff.
21. Brownlie, p. 605; Bastid, p. 71; Nguyen Quoc, p. 168, Verdross & Simma, p. 466.
22. Thus Ago at the 1965 Session of the ILC, ILCYB 1965:I, p. 12(777:26).
23. From the Greek: analysis, ana = up and lysis = loosening.
24. The *genus proximum* may also be construed more broadly as the class of unilateral statements formulated by states, by referring the temporal criterion to the *differentia specifica*.
25. The view can also be maintained that the moments on which reservations may be presented do not have to be included in the definition.
26. Miller (p. 767) and Owen (p. 1090) seemed to admit reservations at any moment before the final consent is given.
27. 956 UNTS 251, art. 18, Annex I lists reservations presented at the time of signature. 276 UNTS 240, art. 20 (reservation not admitted if 1/3 of the parties objects); 658 UNTS 154, art. 23.
28. Thus art. 45(4) of the Revised General Act for the Pacific Settlement of International Disputes from 1949.

29. For example the Warsaw Convention for the Unification of Certain Rules Relating to International Air Transport art. XXVI, 478 UNTS 389.
30. Szafarz, *Treaty Practice*, p. 254.
31. Sondaal, p. 55.
32. Memorandum from the UN Secretary-General, 5 April 1976, to the Director of the Division of Human Rights, UNJYB 1976, pp. 220–221.
33. UNJYB 1978, pp. 199–200.
34. Article 7 of Annex II to the Convention permitted reservations to articles 5 and 14 of the Uniform Law, which according to article I(2) were permitted only at the time of ratification or accession. Articles 9, 22, 27 and 30 of Annex II permitted reservations to the Uniform Law, which according to article I(3) of the Convention may be notified after ratification or accession. MT 1985 pp. 790–793.
35. Letter of the Permanent Mission of France to the UN received by the Secretary-General on 7 February 1979.
36. Letter of the UN Secretary-General to the Permanent Mission of France of 14 September 1978, UNJYB 1978, pp. 119–200.
37. UNJYB 1978, p. 200. The need to make a clear distinction between amendment and reservation has been stressed within the ILC, ILCYB 1951:I, François p. 189(104:89).
38. UNJYB 1978, p. 200.
39. In other words the treaty is modified due to the new norm of international custom.
40. The Vienna Convention does not provide for an amendment to occur in this way, nor are the conditions for the rise of a norm of customary law fulfilled. François remarked that governments could not by common acceptance of a reservation revise a treaty. The whole revision procedure had to be followed with the participation of parliaments (ILCYB 1951:I, p. 170(102:44)).
41. For this practice see *infra* ch. 28.2. More recently a state wanted to withdraw its statements to the Genocide Convention which concerned articles IX and XII by presenting a new statement to the same articles. The government of this state was informed by the UN Secretary-General that it could in accordance with the Vienna Convention regime withdraw its “reservations” at any time, but as far as concerns the formulation of new “reservations” there were only two alternative lines of action: Either the state would have to denounce the Convention before the end of the running 10-year period in accordance with art. XIV (11 July 1985) and accede again to the Convention with the new “reservations”. Or the Secretary-General could notify the other parties of the new “reservations” and ask for their views. If none of them had opposed the reservations within the period of 90 days from the date of circulation, the Secretary-General would consider them accepted and as having entered into force at the date of the letter of the reserving state, i.e., 25 August 1981. (UNJYB 1981, pp. 152–153). The Secretary-General has thus obliged the contracting states to react within a short time in order to establish acceptance. This is of interest considering the practice after the 1952 and 1959 resolutions of the UNGA.
42. Communication by the FRG government received by the Secretary-General on 20 February 1980, MT 1985 p. 792 n.4.
43. Pillet (p. 87) considered reservations on ratification to the Hague Conventions on the laws of war to be “imparadonnable”. He approved only of reservations on signature.
44. Hospers distinguishes between the ‘defining’ and the ‘accompanying’ characteristics of a phenomenon. If a certain condition is present and the result of this is that we are not any longer able to use the term, we have a defining characteristic (or criterion). If on the other hand would accept a term for a phenomenon even if the conditions are not present, we would only have an accompanying characteristic.
For the question of confirmation of reservations presented at signature see RIAA III, p. 1371, the *German-Portuguese Treaty* case; Pleadings, p. 211; ILCYB 1951:I, p. 201(105:83). However some writers did not require confirmation as for example Pomme de Mirimonde (*Traité imparfait*, p. 92) as well as Owen (p. 1098) and some others openly declared their uncertainty in the matter as for example Hudson (IL I, p. xlix).
45. Another question is that a state not party to the Vienna Convention may not feel itself bound by the temporal restrictions. The question is if international custom provides such a rule.
46. The UK in its written statement to the ICJ in the *Reservations* case considered that the unilateral character of a reservation resulted from the fact that the reservation was not “part of

- the common process of drafting and drawing up the Convention'' (Pleadings, p. 51). According to the Israeli statement a reservation was unilateral, because it was put forward unilaterally. Only the acceptance by the other parties could turn it into a legal bilateral or multilateral stipulation (Pleadings, p. 207). See also Nieto Navia, p. 7; La Guardia & Delpech, p. 248.
47. Filippov (p. 19) considered it to be in two ways unilateral, as well as to its presentation as to its entry into operation. See also Gubin, *Sovetskii*, p. 132.
48. Moussa, p. 180ff. Coordinated reservations are also typical for reservation practice of socialist states.
49. See *infra* ch. 22.5.
50. MT 1985 p. 40 n.6.
51. ILCYB 1962:I, p. 146(651:87).
52. The correction of errors in the treaty text is usually the task of the depositary. This he will do in close consultations with the contracting states. Frowein, p. 534.
53. Imbert, *Réserves*, p. 15.
54. A statement that was only affecting the formulation of the text was made by the FRG on signing the 1976 Convention on Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques and was only concerning the correct designation of the Federal Republic of Germany in the Russian text being one of the official ones. MT 1985 p. 770. The words 'provision' and 'terms' are often used invariably to mean norm formulation and norm.
55. A/CONF.39/C.1/L.23.
56. Thus the Austrian representative to the Vienna Conference on the Law of Treaties, Nettel, Vienna Conference, 1st Session, p. 33 (CWh 6:17).

NOTES TO CHAPTER 7

1. Kelsen and Ehrlich being illustrious representatives of these opposite approaches.
2. Cuff & Payne, Chapters 2 and 3; Chambliss & Ryther, pp. 38–40.
3. Needs, aims, goals and values are other central concepts of sociology which, as in the case of the concept of norm, have been given varying contents.
4. Aubert, *Socialt samspel*, pp. 68–69; Aubert, *Rettens sosiale*, p. 24. Where individuals have the same goals this may both lead to common interests and conflict of interests.
5. Talcott Parsons, *The Structure of Social Action*, New York 1937 and *The Social Systems*, New York 1951.
6. Merton, Robert K., *Social Theory and Social Structure*, New York 1968. See pp. 105 and 127.
7. See Friedmann, pp. 337–341.
8. McDougal & Lasswell, *Studies in World Public Order*, New Haven 1960, Chapter 1: Identification and Appraisal of Diverse Systems of Public Order. See especially p. 10ff. on processes.
9. Sundby, p. 9.
10. A classic of the functionalist approach to the problem of social change is Neil Smelser's "Social Change in the Industrial Revolution" Chicago 1959.
11. *Philosophisches Wörterbuch*, Leipzig 1976. See under 'Wert' 3, "Wert im allgemeinen Sinn von Bedeutsamkeit beliebiger Objekte für den Menschen".
12. Pashukanis (see for example *Allgemeine Rechtslehre und Marxismus*, Wien-Berlin 1929) and Stuchka were the early Soviet legal theorists which tended to see the legal system as mainly a bourgeois apparition. This was later criticized especially during the Stalin era. See also Eriksson, p. 3; Tumanov, p. 14.
13. Reich, see for example pp. 12 and 16.
14. In the 1960ies and 1970ies the idea that even legal norms within bourgeois societies may be used to ameliorate the position of the dispossessed has been propagated in Italy and the Federal Republic of Germany. Eriksson, p. 110.
15. Dahrendorf in his work "Soziale Klassen und Klassenkonflikt in der industriellen Gesellschaft" (Stuttgart 1957) expounded a conflictualist view which assumed the existence of a certain amount of common values.
16. Libya's leader Kadhafi presented in a speech on 14 May 1973 the "Third International Theory" which was intended to be "an alternative to capitalist materialism and communist atheism" and which he said was based on the fundamental ideas of the Koran and the Holy Bibles of Judaism and Christianity.
17. Tunkin, *Theory*, pp. 190–203.
18. In a similar way the Convention on Racial Discrimination was preceded by a declaration (UNGA Res. 1904(XVIII)) as well as the Test Ban Treaty (UNGA Res. 1762-A(XVII)), the Non-Proliferation Treaty (UNGA Res. 1665(XVI)) and 2028(XX)) and the 1982 Law of the Sea Convention (UNGA Res. 2749(XXV)).
19. Soviet legal doctrine does not accept the traditional maxims of treaty interpretation. There is a certain reluctance to construe a common aim and purpose when the text is imprecise. Such impreciseness is very often a proof of clashing interests. Bracht, *Auslegung*, p. 67. McDougal, Lasswell and Miller had advocated a truly functionalistic theory of interpretation. When states differ in their expectations as to the application of a treaty the dispute is settled in accordance with a superior "goal of public order" (p. 44).
20. This is one of the reasons given for the practice of participating in treaties with reservations. See ch. 3 beginning.
21. Sundby, pp. 4 and 14–15.
22. Rommetveit, pp 19–27.
23. Newcombe Theodore W., *Social Psychology* London 1957, pp. 94, 211, 221–222; Sherif & Cantril, p. 34.
24. Rommetveit, p. 19.
25. *Ibid.*, p. 21.
26. *Ibid.*, pp. 22–26; Festinger, p. 101.

27. Galtung, p. 214; Luhmann, p. 31ff. Aubert's position is not quite clear. He seems partly to have adopted the concept of Galtung (Socialt samspel, p. 38f.), partly that of Rommetveit (Ibid., 81ff.).
28. Rommetveit's operational definition (p. 50f.) where the conjunction has been replaced by a veljunction suggests that a social norm may exist when a wish or an expectation has been expressed independently of the fact that it should have been received or it has been 'received' without taking note of whether or not it has actually been sent. This is the reason why this concept is not suitable for the present study which builds on the consensual nature of norms.
29. Normative expectations may be said to develop from cognitive expectations.
30. Galbraith, p. 9.
31. Quine, p. 42ff.
32. Eskola, p. 150.
33. Festinger, p. 101.
34. The concept of expectation could be useful in explaining the creation of norms of international custom.
35. Luhmann, p. 46.
36. Davis, pp. 52–80. In international law distinction is often made between usage and custom. The latter term is used synonymously with international customary law. Oppenheim I, p. 26.
37. Lazarsfeld, p. 153.
38. Gibbs, pp. 589 and 591.
39. Hart CL, p. 112.
40. Malinowski, pp. 953–954, 956; Chambliss & Ryther, p. 157.
41. In 1964 the Finnish writer Salama was charged for blasphemy under § 10(1) of the Finnish Criminal Code, which one of his characters in his novel "Juhannustanssit" had committed. The harsh penalty provided for by the code was not backed up by public opinion at that time. This led to an amendment of the paragraph in 1970.
42. The reader will certainly remember the material and the psychological criterion of customary law (see ch. 2). Where one believes that the practice for construing the unanimity rule as intentional custom was meager will find impressive evidence of a widely shared belief in the bindingness of the rule (*opinio juris*). The unanimity rule is a good example of the complementing effects of the two aspects.
43. Gibbs, p. 588 at n. 11.
44. Sundby, p. 59f. and pp. 134–235.
45. Neither of the two elements may however be completely done away with.
46. Davis, p. 52f. See p. 51.
47. Harris, pp. 107–130.
48. Validity 4 = having an inherent claim to fulfilment ('is good', 'deserves respect', 'is binding', 'ought to be observed (on moral or political grounds)').
Validity 5 = being part of a transcendent normative reality are not discussed.
49. These do correspond to Harris' validity 1 and validity 3 which together would result in validity 2.
50. In accordance with Ross' terminology. The norms of conduct are called "norms of duty" (pliktnormer) by Sundby.
51. The validity of norms of competence may be derived from a higher category of norms of competence.
52. Jareborg, Some Conceptions, p. 260; Harris, pp. 123–124. On the interstate level this problem arises in connection with the recognition of insurgents as belligerents or *de facto* governments.
53. Jareborg, Vårderingar, p. 49; Hart CL, p. 111.
54. Jareborg contends that norms do not turn out to be invalid simply for the reason that a superior norm (as for example the ultimate norm of recognition in the terminology of Hart) has been terminated. (Vårderingar, p. 49); Raz (pp. 203–205) treats the difficulties in determining the ratio of obedience to disobedience.
55. Kelsen, H., General Theory of Law and State, Harvard University Press 1946, pp. 369–370.
56. Friedmann, p. 284; Lloyd, p. 292, Goodhart, p. 16; Toulmin (p. 204ff.) discusses the conditions for finite reasoning.
57. See supra pp. 55–56. The rules on the sources of international law are such ultimate norms. With respect to international custom we find the external aspect in the condition of practice and the internal aspect in the *opinio juris sive necessitatis*.

58. Jean Piaget, *Six études de psychologie* (Paris 1964) is a classic in theory of learning. Piaget considers both intelligence and perception to be two forms of adaptive behaviour.
59. It suffices that the individual has internalized the secondary norms of competence and is therefore disposed to internalize also the acts of the legislative. Sundby, p. 162.
60. Hare, pp. 166–172.
61. This has been the case during the period of decolonization. See Chaumont, pp. 460–461.
62. Hart CL, pp. 111–113.
63. "... its rules of recognition on specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials." (Hart CL, p. 113) and further "In this more complex system only officials might accept and use the systems criteria of legal validity. The society in which this was so might be deplorably sheeplike; the sheep might end up in the slaughter-house." (Ibid. p. 114).
64. Sundby, p. 127. In connection with his discussion on internalization Sundby mentions that norms may be acquiesced in less out of a belief in the goodness of the norm but more out of a feeling of pure duty.
65. Durkheim, Chapter II, especially p. 114ff.; Chambliss & Ryther, Chapter 8, p. 156f. See also Hart's simple society (CL, p. 11).
66. Thus the 1907 Hague Convention (II) Respecting the Limitation of the Employment of Force for Recovery of Contract Debts was considered a failure and largely inoperative. Pomme de Mirimonde, *Traité des imparfaits*, p. 54; Khadjenouri, p. 92. The Hague Convention (XII) Relating to the Creation of an International Prize Court was not ratified due to the reservations presented on signature. Scott, pp 237 and 239; Khadjenouri, p. 95.
67. Thus formal and psychological validity remedy defects in each other. See for example Vienna Convention art. 45.
68. Brownlie, p. 86.
69. There is nothing that compels us to accept only one norm as an ultimate one. There may well be more than two of them. In international law we may for example contend that there are at least two ultimate norms, one stating that international norms may be manifested through international custom, the other that they may appear in the form of treaties. There is no need to reductionism, requiring that all norms of international law must be traced back to one single norm, either establishing international custom or treaties as a primary source. Depending on if one chooses the single-norm or the multiple-norm solution one may arrive at a different description of the system of international legal norms. O'Connell for example propagates the primacy of international custom which naturally affects his description of the valid norms in international law (O'Connell I, p. 7).
70. What is to be considered as international customary law is stated in art. 38 of the Statute of the ICJ ("general practice accepted as law"). The Vienna Convention enumerates the conditions that have to be present before a written instrument is to be counted as a valid treaty and thus as a source of international law.
71. Ross, *Statsforfatningsret*, pp. 176–181.
72. Hart, *Self-referring*, p. 312; Sundby, pp. 382–386.
73. Sundby, p. 385.
74. Ibid., p. 386.
75. Ibid., p. 386.
76. Ibid., p. 386.
77. See *supra* ch. 7.3.
78. Art. 4(4) is self-referring but art. 28 not.
79. Art. 24(4).
80. See *infra* ch. 25.5.2.2.b.
81. That a number of rules to be found in the Vienna Convention will be applied to themselves, as for example the rules on interpretation, is evident, but this will be possible by invoking them as international customary rules.
82. Vienna Conference, 2nd Session, pp. 311–345. See for example (100:9 and 39) and (101:2–4).
83. Ibid., Nascimento e Silva p. 311(100:9); Sinclair p. 314(100:39). Nisot (p. 204) states that the rules on reservations apply as part of general international law. Sztucki (pp. 285–287) argues that there are non-legal, practical reasons to apply the Vienna Convention rules to reservations formulated to its provisions. In the present case we may say that the absence of formal validity

could be compensated by the presence of the psychological one. The Vienna Convention reservation regime is actually applied to reservations to the provisions of the Convention and it is done out of the belief that this is the only reasonable solution and that it therefore ought to be a binding one.

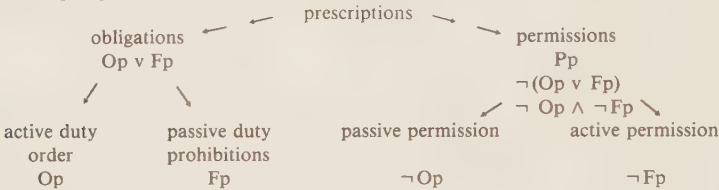
84. The rule affected by the reservation is the norm. The rule that regulates the operation of reservations is a metanorm and the rule which determines if self-reference between metanorms is possible is a meta-metanorm.
85. The objections by the USA to statements to the Vienna Convention is based on the assumption that reservations and objections have the legal effects as indicated in art. 20 (MT 1985 p. 736).
86. Only one of the statements to the Vienna Convention had been termed as incompatible. This was the case with the Syrian statement with regard to which the US countered with a qualified objection. (MT 1985 p. 736).

NOTES TO CHAPTER 8

1. The atomistic approach goes for defining the individual norm as J.L.Austin does. Hart and Raz represent a systemic approach looking at norms as the co-functioning of different categories of norms.
2. For Rommetveit a social norm may exist even if it is not perceived by the norm-receiver. Rommetveit, pp. 25 and 51.
3. Searle, *Speech Acts*, p. 16. See also Searle, *What is ...*, p. 39.
4. J.L.Austin, p. 108; Searle, *Speech Acts*, pp. 23–26.
5. A whole society could be described in the light of the operation of perlocutionary speech acts.
6. See the example by Searle of the American soldier captured by Italian troops, who tries to make his captors believe that he is a German soldier in order to get released (Searle, *Speech Acts*, pp. 44–45). "... one's meaning something when one utters a sentence is more than just randomly related to what the sentence means in the language one is speaking." (Ibid., p. 45).
7. Searle, *Speech Acts*, p. 43; Searle, *What is ...*, p. 45.
8. Sundby, p. 26. Whereas the distinction may be clear in theory, it may be difficult in instant cases. Uttering "The meeting is hereby adjourned" the perlocution is hard to be separated from the illocution. Such an utterance would according to Austin belong to the group of "exercitives", J.L.Austin, pp. 109, 115 and 154.
9. Searle, *Speech Acts*, pp. 54 and 63; J.L.Austin, p. 120, "illocutionary force" and "locutionary meaning".
10. The utterance of "Hello" does not have a propositional content.
11. Searle, *Speech Acts*, pp. 26–27, p. 72ff. and p. 97ff.
12. Ross uses the term in a narrower meaning, meaning only duty, Ross, *On Law*, p. 162. In the present work it is used as a general term meaning any legally relevant binding regulation.
13. 'Impossibility of performance', in the Vienna Convention art. 61.
14. Thus the Award in the *Anglo-French Continental Shelf* arbitration. See *infra* ch. 27.1.
15. Sundby, p. 121.
16. See *supra* ch. 7.3. n.64.
17. Raz, pp. 184–185.
18. Alchurrón & Bulygin, pp. 145 and 156.
19. Alchurrón & Bulygin, pp. 33 and 146, 153–168.
20. Hart CL, pp. 92–96.
21. Raz, pp. 147–156 and pp. 156–166.
22. Ibid., pp. 162–165.
23. Ross, *On Law*, p. 161.
24. Sundby, pp. 80–81; similarly Jareborg, Regler, p. 391.

NOTES TO CHAPTER 9

1. Raz, pp. 168f. and 170–183.
2. Ross, *On Law*, pp. 161 and 164–166; Jareborg, Regler, p. 389. Though he terms norms as “rules” and his “norms” would be equivalent to the propositional content.
3. Prior, p. 220; Sandberg & Sundby, p. 35.
4. v. Wright, p. 22.
- 5.



6. Sundby, pp. 62–63.
7. There is no duty to implement.
8. Sundby, pp. 111–114.
9. Jareborg, Regler, p. 395.
10. See *supra* ch. 8.1. in fine.
11. 78 UNTS 277.
12. Sundby, p. 81.
13. *Ibid.*, p. 361.
14. *Ibid.*, p. 361.
15. *Ibid.*, p. 109.
16. *Ibid.*, p. 109.
17. *Ibid.*, p. 109.
18. Jareborg, Regler, p. 392.
19. Raz, p. 157.
20. The US delegate to the Vienna Conference was one of those which spoke most energetically against degrading the preparatory work to only a supplementary means of interpretation. Vienna Conference, 1st Session, pp. 167–168(31:38–46).
21. There are certain limitations to this liberty. See Vienna Convention art. 45.

NOTES TO CHAPTER 10

1. McCormick, p. 206.
2. The differentiation between various rights and obligations as presented by Hohfeld we find already in Salmond's "Jurisprudence" 9th ed. pp. 289–309.
3. Ross, *On Law*, p. 161; Feinberg, p. 56ff. For Feinberg 'liberty' is the opposite to 'duty'. 'Freedom' means the absence of other kinds of constraints. A person is both legally permitted and factually able to perform an act.
4. Hohfeld, pp. 51–60.
5. Feinberg mentions the duty to obey traffic regulations, which is not correlated with the right of another person. Feinberg, p. 63.
6. Benn in the *Encyclopedia of Philosophy*, Vol 7–8, pp. 196–197.
7. Such a right and duty to vote we find in the constitutions of certain Latin American states. Thus for example art. 44 of the Honduran Constitution of 1965 (updated by Decree No. 131 of 11 January 1982) states: "Suffrage is a right and a public duty. Voting shall be universal, *obligatory*, egalitarian, direct, free and secret." See also art. 110 of the Venezuelan Constitution of 1961: "Voting is a right and public function. Its exercise shall be *compulsory* . . ." and art. 34 of the Nicaraguan Constitution of 1974: "The following are the *obligations* of the citizen: . . . 2) To vote in popular elections . . ." (emphasis added). Art. 25(d) of the 1979 Statute on the Rights and Guarantees of the Nicaraguan People states that all citizens shall enjoy without restriction the right "to vote and to be elected, and to have generally equal access to public office".
8. See *infra* ch. 19.3.1.2.1.a.
9. See *supra* ch. 9.1. Orders may be seen as both active duties and active claim-rights and prohibitions as both passive duties and passive claim-rights. See Feinberg, p. 59 in the case of rights.
10. Certain authorities, such as for example, prosecutors, have both a permission and a duty to undertake certain measures (to indict).

NOTES TO CHAPTER 11

1. The Vienna Convention definition would embrace 'commissive reservations' though they definitely are not considered to be proper reservations. See *infra* ch. 6.3.
2. Imbert, *Réserves*, p. 16.
3. MT 1985 pp. 156–162. Some states such as Sweden have thought it not to be the purpose to stipulate free access to all kinds of public offices. See *infra* ch. 26.1.J.
4. See the reservation by Iran on signing the Continental Shelf Convention, MT 1985 pp. 695–696.
5. MT 1985 pp. 71–72.
6. Imbert, *Réserves*, p. 16 n.31. Szafarz (Treaty Practice p. 250) states that in Polish reservations practice up to 31 December 1972 no such reservations may be found. For a presentation of the reservations see Pilloud, *Reservations*, pp. 121–123; Pilloud, *Réserves*, pp. 418–420.
7. Pomme de Mirimonde, *Traité imparfaits*, pp. 37–39.
8. *Ibid.*, p. 38.
9. The 1949 (I) Geneva Convention art. 38, (II) Geneva Convention art. 41.
10. The statements made on signing were confirmed on ratification 6 July 1951. Information received from the Swiss Federal Department for Foreign Affairs.
11. See *infra* chs. 11.4. and 12.
12. As a qualitatively modifying reservation may be mentioned the Peruvian reservation to the ILO Convention (2) concerning unemployment transferring the supervision of unemployment under the authority of the state, without establishing advisory committees under art. 2. Peru abandoned the reservation after having received a letter from the Acting Director of the International Labour Office explaining the restrictive attitude of the ILO to reservations. See *Pleadings*, pp. 250–257.
13. For other examples see Müller, pp. 89–90, 148.
14. Sweden proposed the insertion of the term "limit" in the definition of 'reservation' which was rejected because it was redundant.
15. In respect to outer space the absence of regulation was quite soon remedied. A general authorization to explore space subject to certain restrictions was proclaimed by UNGA Resolution 1721 A(XVI) of 20 December 1961 and 1962(XVIII) of 13 December 1963. This was confirmed by the 1967 Treaty on Principles Governing the Activities of States on the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies. The time lapse since space exploration began in 1957 and when the first rough regulation of the matter was at hand turned out to be quite short.
16. Chaumont (p. 448) considers that the application of the relevant provision remains in suspense. Cheng, p. 35ff.
17. MT 1985 p. 574.
18. The United Kingdom, Australia and New Zealand. See Pilloud, *Reservations*, pp. 184–185.
19. Provided that members of such staff are not nationals of the receiving state.
20. Romanov, pp. 86–87, 93. UN Conference on Diplomatic Intercourse and Immunities. Vienna 2 March – 14 April 1961, Official Records Vol. 1 [(A/CONF. 20/14), Carmona p. 194 (CWh 32:22 and 26), Dankwort p. 198 (CWh 33:2) and Tunkin p. 198 (CWh 33:8)], 32nd meeting, p. 194 Bouziki (CWh 32:20).
21. MT 1985 pp. 54, 55 and 56. The Arab states were not eager to accept personal immunity with regard to acts external to their functions. Moussa, p. 192.
22. 'Restrictive' reservations to stipulative definitions are more frequent. See for example the reservations by Algeria, Egypt, Guatemala, Haiti, Senegal and Syria to the definition of 'tourist' in the 1954 Touring Convention (MT 1985 pp. 363–364).
23. Pomme de Mirimonde, *Traité imparfaits*, pp. 64–65.
24. 189 UNTS 182; In order to see how reservations operate it may be advisable to transform a norm of qualification into a norm of conduct (acts a,b,c,d and e qualify for acts of genocide – there is a duty to consider acts a,b,c,d and e as cases of genocide). If a state enters a reservation excluding act d from the definition, the reserving state will not have the obligation to count act d as a case of genocide, but may consider there a liberty to do so.

25. As also Chile, Cuba, Ecuador, Guatemala, Haiti, Persia, El Salvador, Siam and Turkey (MT 1985 pp. 1713–176).
26. Scott, pp. 42–43.
27. See *supra* ch. 4.1. See discussion on the question of recommendations.
28. ILCYB 1950:II, p. 239; Brierly considered that statements by which states 'contract in' their colonies under the treaty obligations are "negative reservations". Brandon (pp. 431–432) accepts that a contracting state may turn its liberty into a duty. For the other contracting states this would create a claim-right. Reciprocally the confronted states would find their liberties infringed and their duties enlarged. Thus the reserving state on the basis of reciprocity principle would find its claim-right widened to the same extent. Gomez Robledo (p. 12) considers that no reciprocity is to be assumed, therefore the statement would be no real reservation.
29. *Ibid.*, p. 239.
30. Liang, UN Practice, pp. 123–126. See also Dam, pp. 347–348.
31. MT 1985 pp. 215–216.
32. Curzon, p. 37.
33. The formulation is not very clear and therefore it is hard to see which effects the contracting states attributed to the disapproval of the South African statement.
34. With "declaring state" is meant a state that has presented a statement irrespective of whether it is a reservation or only a declaration.
35. Bokor-Szegö (A nemzetközi, pp. 159–160, 303) does not accept "extensive" reservations meaning extensive for the declaring state.
36. Liang, UN Practice, p. 125. Saba, p. 431. More duties compared with pre-treaty situation.
37. Where certain states parties to the 1958 Territorial Sea Convention reserved their rights to require previous authorization for foreign warships intending to pass through their territorial waters it resulted in a duty for the other parties to apply for authorization for innocent passage. The "extensive" reservation of Bokor-Szegö (see n. 415a) is termed a "commissive" reservation in the present work.
38. 193 LNTS 47.

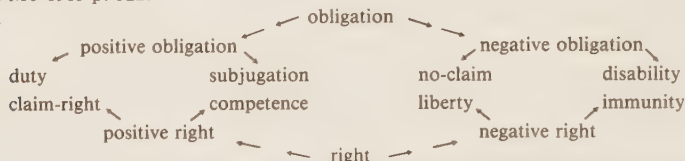
NOTES TO CHAPTER 12

1. This assertion does not take into consideration the principle of reciprocity according to which a confronted state will profit from the reservation with respect to the reserving state. This principle would appear to re-establish the balance of rights and obligations between reserving state and confronted states.

2. MT 1985 p. 360.

3. MT 1985 p. 322.

4.



5. Only Hungary and Czechoslovakia, both land-locked states, formulated reservations to both articles. The other reserving states presented reservations only to article 23.
6. This holds true with respect to treaties operating on a mutual basis.
7. For the limitations of the correlativity and therefore also of the reciprocity principle see ch. 19.3.
8. This is the case when we look at the effect of reservations strictly on the basis of the single relation: obligation for the reserving state – right for the confronted state. The reciprocity principle may free a confronted state from the respective positive obligation, but only with regard to the reserving state.
9. Glaser, E. (p. 36) and Göttling (p. 25) do not accept the possibility of ‘extensive reservations’.
10. Baldoni, p. 361; Pilloud II, p. 122; Glaser, E., p. 36, Herrera Marcano, p. 92; Imbert, Réserve, p. 16; Pleadings, pp. 51–53, Written Statement of the United Kingdom. Nieto Navia (p. 7) states only that *generally* reservations have a restricting character. Brandon states that if a state enters more obligations on a unilateral base it would not be a proper reservation (i.e., a ‘commisive reservation’ pp. 431–432). If it would do so on the condition of reciprocity, this would result in a similar increase of obligations for the confronted states and thus constitute a proper reservation (p. 432). Durdenevskii (Soglasie pp. 101, 102) speaks of the “widening” effect of a reservation although Göttling (p. 25) understands it to mean widening for the reserver.
11. By denying a duty a reservation purports to oblige other states to abstain from presenting a corresponding claim. If the reservation is formulated so as to assert the opposite, a liberty, it will have exactly the same effect. As a rule a reservation refers only to the legal position of the reserving state. Nevertheless the legal status of the confronted states will be respectively affected, limiting their corresponding rights and enlargening their duties.
12. See ch. 19.3.
13. Reservations eliminating obligations within the sphere of human rights operating on the national level would still qualify for admissible reservations.
14. Article 56(1) of the 1982 Convention on the Law of the Sea.
15. The duty concerns the case where the sending state maintains its intention to forward the bag to its embassy. It may always decide to let the diplomatic bag go back. Not all states having formulated such reservations have made use of them. Thus for example Libya. See House of Commons, Foreign Affairs Committee Series 1983–1984. Diplomatic Immunities and Privileges. Minutes of Evidence Wednesday 20 June 1984 p. 3. Where a reserving state wishes to open the diplomatic bag the sending state will probably not submit to such a procedure and prefer to send the diplomatic bag back. Any information to the embassy has then to be settled in some other manner.
16. MT 1985 pp. 57–63. See the wording of the objections. Szafarz considers that the statements to articles 12 respectively 45 of the 1949 Geneva Conventions on the protection of war victims maintaining the responsibility for the transferring states after transferal were proper reservations (Treaty Practice, p. 250).

17. MT 1985 pp. 687–690.
18. *Ibid.*, pp. 655–657. Szafarz who accepts the possibility of ‘extensive reservations’ brings the same example (Reservations, p. 296 n.6) and states that confronted states may be bound to furthergoing obligations (p. 312). She does not mention if the rule of tacit acceptance applies to such reservations, but it must be assumed that she in this respect makes no difference between “excluding”, “limiting” and “extending” reservations (Treaty Practice, p. 261).
19. Imbert, *Réserves*, p. 16.
20. See *supra* n.6.
21. As provided by Imbert (*Réserves*, p. 16f.). See also the statement of the UK to the ICJ, Pleadings, p. 53.
22. See *infra* ch. 9.1.
23. Pilloud, *Reservations*, p. 122.

NOTES TO CHAPTER 13

1. 'Statement' designates any written notification on signing, ratifying, etc., of a treaty. 'Statement' is thus a general term covering both 'reservations' and 'declarations' which are short of reservation. See ch. 2 n.7.
2. 97 LNTS 418; Hudson IL I, p. 1634; Hackworth, p. 137; Harvard Draft, p. 862. The UK attached a suspending condition to the ratification of the ILO (21) Convention Concerning the Simplification of the Inspection of Emigrants on Board Ship. The British ratification was conditional on the ratification of that same convention by France, Germany, the Netherlands, Italy, Norway and Spain. (Pleadings, p. 265).
3. Hackworth, p. 137. A further case where a condition was suspending the entry into force of an entire treaty, is the declaration made by the Austrian representative when signing the 1888 International Sugar Agreement. The Agreement had the aim to forestall the dumping of sugar prices to the disadvantage of the local consumer. It was evident that the Agreement would not operate effectively if the principal producers of sugar within Europe did not adhere to the convention. Austria made its signature dependent on the condition that all the important producer and consumer states in Europe adhered to the Agreement on the date of its entry into force. Similar suspending statements were made by Brazil, Denmark, Belgium and France. Pomme de Mirimonde, *Traité imparfaits*, p. 19 and pp. 29–31.
4. Haiti signed the 1933 Montevideo Convention on the Nationality of Women "With reservation" (OASTS 38 p. 2). It is not easy to conceive what such a general statement actually means. See Aide Mémoire by E. Vela. The best guess would be that it amounts to a 'reservation of ratification'.
5. Podestá Costa, p. 1; Bishop, p. 304.
6. However Balladore-Pallieri states (pp. 470, 474) that the new practice of referring the treaty for acceptance to the parliament was nearly instantly recognized as legitimate.
7. MT 1985 pp. 782 and 784.
8. 3 Bevans 152.
9. The practice among the Nordic countries has been to wait with ratification until the intended amendments of internal legislation has been carried out. The Nordic legal cooperation has also extended to the question of identical reservations by the Nordic countries. The question of criminalizing war propaganda through parallel legislation was up for common consultations. At one instance it seemed possible to make the needed amendments in the legislation of the respective Nordic countries. In the end no agreement was achieved and reservations had to be formulated to the provision forbidding war propaganda. The merits of the alternative to ratify with reservations is to make the treaty enter into force at an earlier date.
10. See supra ch. 2.d.
11. The 1964 London Fisheries Convention provides in its art. 12 that it is to apply to those waters adjacent to the coasts of the contracting parties which are listed in its Annex I. This means that all other areas are excluded from the convention regime. The territorial application of the Convention may be later amended by the common consent of all the contracting parties.
12. Such a unilaterally presented statement was the one by Burma made on signature of the 1961 Single Convention on Narcotic Drugs and confirmed on ratification. "(1) To allow addicts of the Shan state to smoke opium for a transitory period of 20 years with effect from the date of coming into force of this Single Convention . . ." (MT 1985 p. 234). This statement means a restriction of the implementation of the Convention both *ratione loci* and *ratione temporis*.
13. View expressed by Yepes in the ILC. ILCYB 1951:1, p. 160(101:10).
14. The only reservation affecting the provision of passage through international straits was the one entered into by Tunisia, which denied the bindingness of para. 4 article 16. MT 1985 p. 679.
15. Article 41.
16. For example Denmark on ratifying the 1923 Convention and Statute on the International Regime of Maritime Ports with respect to Greenland (MT 1985 p. 812). The UK ratified the 1949 Convention on Road Traffic on 8 July 1957. Only on 22 January 1958 did the Isle of Man and on 28 May 1958 Guernsey and Jersey become bound by the Convention (MT 1985 p. 399).

17. Kappeler, *Réserves*, p. 12.
18. ILCYB 1959:II, Fitzmaurice, p. 48; Mc Nair, p. 116ff.; Fawcett, *British Commonwealth*, pp. 210–214; Fawcett, *Treaty Relations*, p. 101.
19. Huber, p. 28; Khadjenouri, pp. 25–26.
20. Khadjenouri, p. 25.
21. *Ibid.*, p. 26.
22. See Fawcett, *British Commonwealth*, p. 211; Fawcett, *Treaty Relations*, p. 94.
23. Vienna Conference, Documents, p. 33; 1st Session pp. 162, 164, 428–429; 2nd Session p. 55.
24. Sinclair VC I, p. 59.
25. Pleadings, pp. 233–234. See the Statement by ILO.
26. *Ibid.*, p. 308. Statement by Kerno.
27. 527 UNTS 197; 472 UNTS 206; 119 UNTS 132; 435 UNTS 200; See Blix, *Handbook*, p. 156. For examples see Fawcett, *Treaty Relations*, pp. 96–98. Colonial clauses became more common after 1880.
28. Gubin, *Sovetskii*, pp. 138–139. Schweisfurth, p. 259; Fawcett, *Treaty Relations*, p. 106.
29. Elias, p. 51. Bokor-Szegö (Role, pp. 140, 153) maintains that UN treaties should apply to both metropolitan and dependant territories but recognizes limitations to this rule.
30. The GDR declared on ratifying the Single Convention on Narcotic Drugs that article 42 on application to non-metropolitan areas was violating the Declaration on the Granting of Independence to Colonial Countries and Peoples, Res. 1514(XV) (MT 1985 pp. 234–235).
Filippov (p. 45) considered the statements to the colonial clause of the Genocide Convention to constitute reservations. He opposed the right of option for the metropolitan states. Droz (p. 394) considered these statements to be simply political declarations.
31. On notifying that the Covenant on Civil and Political Rights was to apply to Jersey the UK stated that art. 11 according to which imprisonment was not to be allowed merely on the ground of inability to fulfil a contractual obligation (MT 1985 p. 134).
With regard to treaties creating absolute obligations of a humanitarian character, such as for example the prohibition of genocide which binds state authorities irrespective of the nationality of the individual, a denial of colonial application would have a 'restricting' effect.
32. The question of lack of competence to conclude treaties is governed by art. 27 of the Vienna Convention. Díez de Velasco (El sexto, pp. 1034–1033) believes them to be interpretative declarations, which according to him are to be assimilated with reservations.
33. Henkin, *How Nations* p. 92, Corwin, pp. 148–149, 168.
34. Whiteman, pp. 189–193.
35. 3 Bevens 378.
36. IATC B-21, p. 167.
37. 8 UST 1219; Whiteman p. 186.
38. 2 Bevens 737.
39. Hackworth, pp. 120–121.
40. USTS 994; 3 UNTS 367; Bishop, p. 314.
41. See Deutsch (p. 300) who considers that generally formulated statements should not be construed to result in any derogation from the treaty system.
42. 56 Columbia Law Journal (1956), "The Treaty-Makers and the Law-Makers: The Niagara Reservation." p. 1151ff.
43. *Power Authority of the State of New York v. Federal Power Commission*. 247 F(sd) 538 (1957).
44. Declarations of internal policy may originate from both the executive and the legislative. The US Senate has been quite active in attaching such statements to its resolutions of consent.
45. 1 Bevens 604, n.6.
46. Harvard Draft, pp. 861–862.
47. Such a more recent example we have in the US declarations to the US-Spanish Treaty of Friendship and Cooperation from 1976. See *infra* n.55.
48. See for example Hackworth, p. 132; Bishop, p. 356; Scheidtmann, p. 36.
49. Podestá Costa, pp. 4–6; Gomez Robledo, pp. 11–12. The decisive criterion was that it was only up to the US to decide on its application or interpretation.
50. Podestá Costa, p. 5; v. Crayen, p. 56.
51. The principle of *bona fides* would require that the presumption is that the doctrine conforms to the treaty obligations and not that the treaty obligations conform to the Monroe doctrine.

- The doctrine may have relevance in the case an imprecise provision has to be interpreted.
52. Ulyanova, p. 99ff.; Bolintineanu, p. 201; Talalaev, p. 78, Schweisfurth, p. 259;
 53. The Democratic Republic of North Korea and the Republic of South Korea are not members of the United Nations.
 54. The formula has become common since the Vienna Conference of 1961 on Diplomatic Inter-course and Immunities and the 1963 Vienna Conference on Consular Relations. Vienna Conference on the Law of Treaties, 2nd Session, p. 242(90:59).
 55. In the United States there has been some discussions as to the status of declarations as compared with reservations. The question was if the President had to include declarations initiated by the Senate in the instrument of ratification. In a Department of State memorandum from 4 August 1976 the legal adviser of the Department, Monroe Leigh denied that there was any such obligation for the President to include in the instrument of ratification of the 1976 Treaty of Friendship and Cooperation between the United States and Spain various Senate declarations relating to the relations between Spain and the West European political and economical institutions and the military commitments of the US in the Mediterranean, Digest of US Practice in International Law (1976), pp. 214–217.
 56. 3 Bevans 21–22; MT 1985 p. 215.
 57. Bot, p. 31; Official Records of the Security Council, Doc. S/1466 Add.1, UN Secretary-General memorandum 1950, Suppl. for 1 January through 31 May 1950, Wyzner, p. 230, Pinto p. 232, Warioba, p. 244, Samad, p. 245, Jagota, p. 247, Khlestov, p. 248, Muuka, p. 251, Eustathiades, p. 327; Add.2, Dadzie, p. 336.
 58. Bot, pp. 136–138.
 59. For example Quadri, 4. ed. p. 124; Quadri, 5.ed. p. 163; Glaser, E., p. 60; Whiteman, p. 158. Gubin (Sovetskii, p. 129 n.6) considers such statements to be reservations and mentions the US statement to the 1930 London Convention.
 60. The US declaration of non-recognition on signing the 1931 Convention Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs met with strong protests from El Salvador (MT 1985 pp. 215–216) whose government considered that “... those *reservations* (emphasis added) constitute an infringement of the national sovereignty of El Salvador whose present Government has been recognized by the majority of civilized countries in the world.” and that “... the Convention in question being of a strictly humanitarian and hygienic character does not offer a suitable occasion to formulate such political reservations as have called forth this comment.” Not a single party contended by invoking the unanimity principle that the United States was precluded from participation in the convention. No party nor the depositary contended that the disapproval of El Salvador would in accordance with the unanimity principle result in the exclusion of the United States from participation in the convention, not even El Salvador itself.
 61. For the reciprocity with respect to humanitarian treaties see infra ch. 19.3.1.2.a. and with respect to the laws on war see ch. 19.3.1.2.b.
 62. SIPRI Yearbook 1985, p. 518.
 63. The question is whether positive or negative reciprocity will apply. Kuwait and Syria could theoretically invoke positive reciprocity when using gases against Israel, but would then have also to admit Israel’s right to do so. Israel on her side would possibly invoke negative reciprocity, i.e., a breach of the protocol. The effects will be the same, with the exception that in the latter case the question of international responsibility becomes relevant.
 64. MT 1985 pp. 130–133, 119–121.
 65. MT 1985 p. 125 n.7.
 66. Pilloud, Reservations, p. 118.
 67. MT 1985 p. 121.
 68. An example of the former unspecified kind is provided by the Argentinian declaration to the 1954 Convention on the Status of Stateless Persons (MT 1985 p. 184):

“The application of the Convention in territories whose sovereignty is the subject of discussion between two or more States, irrespective of whether they are parties to the Convention, cannot be construed as an alteration, renunciation or relinquishment of the position previously maintained by each of them.”

This declaration in general terms seems to have the sole aim of excluding any possibility to

construe Argentina's accession to the convention as a disclaimer of any of its claims to the territories controlled by the United Kingdom being a party to the Convention.

69. See the statement of Argentina to the 1971 Convention on Psychotropic Substances, MT 1985 p. 241. The UK has lately declared that the Argentine statement is void of any legal effect. Notification of 28 February 1985 to the UN Secretary-General concerning Argentine communication concerning UK declaration of territorial application to the Falkland Islands (MT 1985 p. 88 n.8); Similar notification with respect to the Genocide Convention (MT 1985 p. 100 n.7); CESC (MT 1985 p. 125 n.8); CPCR (MT 1985 p. 146 n.10); Refugees Convention (MT 1985 p. 183 n.30); 1961 Narcotic Drugs Convention (MT 1985 p. 219 n.6) and Supplementary Convention on Slavery (MT 1985 . 587 n.7).
70. Bos (Theory, pp. 11–13) discusses the distinction between 'interpretation' and 'application'. He argues that neither an absolute distinction nor a complete merger can be made between these two concepts. A clear distinction can be made when an organ of an international organization interprets the rules regarding its own competence and then applies them in making a recommendation (p. 12). Interaction (which naturally supposes a distinction) is possible when a court applying a rule to a specific case takes into consideration certain political effects the various possible interpretations may have and gives such considerations an impact on the choice between these interpretations. It would appear that the interaction may be more intense in the case of 'practical' or 'juridical interpretation' than in 'doctrinal interpretation'. Bos seems in the end to suggest that "interpretation" should be treated as a general concept, being partly "clarification" (interpretation as conceived in the present work) and partly "application" (Theory, p. 14).

NOTES TO CHAPTER 14

1. Bowett, Reservations, pp. 71, 88–89.
2. ILCYB 1962:II p.62; ILCYB 1965:II, p. 52; Fitzmaurice, *The Law*, pp. 274–275; Detter, pp. 50–51; Imbert, *Réserves*, pp. 83–86.
3. Gros, ILCYB 1962:I, p. 149(652:40).
4. See ch. 16.3.2.
5. The Harvard Draft used the term ‘make’ in an ambiguous way to mean ‘present’ and ‘introduce in a binding way’. Draft art. 14(a) states that “If a treaty is signed by all signatories at the same date, a State may make a reservation when signing only with the consent of all the other signatories.” (p. 870) In the comments we find the following statement: “Thus a reservation at signature, made in a manner described above, probably need not be, although it usually is, repeated in the instrument of ratification of the State making it.” (p. 848f.) And further: “Irrespective of when they may be *proposed*, reservations are practically invariably *made* – i.e., formally recorded in some one of the ways discussed above – at the time of signature, ratification or accession.” (p. 854) See also the rules adopted by the Governing Body of the Pan American Union of 1932: “With respect to the legal status of treaties to which reservations are *made* but not *accepted*, the Governing Board of the Union understands that . . .”. Here ‘made’ is to be understood to mean formulate or present.
6. The history of the rules on reservations provides an illuminating example of how legal language undergoes successive differentiation and clarification. Similarly the terms ‘party’ and ‘contracting state’ have in art. 2 of the Vienna Convention been given clearly delimited meanings.
7. Ambiguities do not present any danger if one is aware of them.
8. This is the basic rule and there is generally no objective way to settle the question of admissibility as concerns the compatibility requirement. This is not the only occasion where a notion is assumed to have an absolute character although there are no objective means to establish it but which has to be done individually in each instant case. The same holds true, for example, with the rule of *jus cogens*. Certain treaties may provide for a machinery to determine the compatible or incompatible character of a reservation like the Convention on Racial Discrimination. Certain groups of treaties like organizational treaties or restricted multilateral treaties have also the means to settle the question of compatibility (majority decision by the competent organ, unanimous vote).
9. Pleadings, p. 228; Gormley, *Negotiated Reservations*, pp. 65–80.
10. Pleadings, p. 232.
11. 500 UNTS 40.
12. Thus art. 69 of the 1972 Cocoa Agreement (882 UNTS 99).
Art. 1(1) of the League of Nations Covenant. Switzerland was permitted to make a reservation by special decision of the Council. Reservations would not have been admitted to the UN Charter. See ILCYB 1950:I, Liang p. 92(53:29). Art. 27 of the Constitution of the UNIDO. Müller, p. 108.
13. Art. 65 of the 1930 London Declaration; art. 27 of the Tlatelolco Treaty for the Prohibition of Nuclear Weapons in Latin America.
14. The best known examples are the 1951 Refugees Convention (art. 42); the 1954 Convention on Stateless Persons (art. 38); the Continental Shelf Convention (art. 12). On the other hand see the reservation clause in art. 19 of the 1958 Fisheries Convention which forbids reservations to arts. 6, 7, 9, 10, 11 and 12. Most of these articles concern the disputes settlement machinery. The clause does not state anything about article 2 which contains a definition of “conservation of the living resources of the high seas”.
15. The clause prohibiting reservations may naturally be formally amended according to the terms of the treaty itself or where no such provisions exist according to the general rules of international treaty law (see art. 40 of the Vienna Convention). It would appear that an exception which does not modify the reservation clause could be orally agreed upon by all parties without following the requirements of formal amendments.
16. See *infra* chs. 16.3.1. and 2.

17. ILCYB 1962:II, p. 257 art. 17(1) (c); ILCYB 1965:II, p. 50 art. 18(2) (b).
18. Vienna Conference, Documents, pp. 22 and 27.
19. A/CONF.39/C.1/L.136.
20. UN Doc. A/16309/Rev.1, ILCYB 1966:II, p. 207.
21. Vienna Conference, 1st Session, p. 415f. (CWh 70:16 and 23); 2nd Session, p. 30(P1M 10:35). The Polish amendment accommodated also the wish of the US for a more flexible attitude towards the formulation of reservations (Kearney, p. 511).
22. Vienna Conference, 1st Session, p. 130 (CWh 24:48). With respect to certain treaties there has been reluctance to accept the presumption of liberty to formulate reservations. Droz (pp. 386–388, 144) contends that with respect to the Convention of the Hague Conference on Private International Law the old presumption that express authorization excludes the right to present reservations is still applicable. See also Müller who refers to the preparatory work (pp. 386–388).
23. Pleadings, p. 25.
24. Ibid., p. 24.
25. Ruda, Efectos jurídicos, p. 25.
26. Holloway, Réserves, pp. 182–184; Fitzmaurice, Reservations, p. 13; Khadjenouri, pp. 203–205; Kappeler, Réserves, pp. 93–94; Julliy, p. 274.
27. Report of the ILC Covering the Work of its 3rd Session, May 16 – July 27, 1951 (UN Doc. A/1858).
28. The ICJ discussed the compatibility criterion only in respect to the Genocide Convention. It was against this criterion that the dissenting opinions directed their main criticism. Though the advisory opinion was restricted to the case of the Genocide Convention, the ensuing debate seemed to treat the opinion as a proposal for a generally applicable regime.
29. US amendment A/CONF.39/C.1/L.126; Spanish amendment A/CONF.39/C.1/L.147.
30. Vienna Conference, 2nd Session, p. 35.
31. Vienna Conference, 1st Session, Khlestov p. 134 (CWh 25:18); Haraszi p. 122 (CWh 23:12). See also Korchak (Ukraine) p. 115 (CWh 22:2), Dadzie (Ghana) p. 119 (CWh 22:66), Ruda (Argentina) p. 130 (CWh 24:44).
32. Vienna Convention, 2nd Session, p. 35 (P1M 11:2 and 3). Bos states that it is not possible to separate between 'object' and 'purpose' but that they have to be treated as parts of the same concept (Theory, p. 150).
33. Lauterpacht, pp. 115–118; D.R. Anderson, p. 470; Fitzmaurice, The Law p. 286; Lalive, p. 235; Fenwick, Report, p. 122.
34. ILCYB 1962:I, pp. 162–163(654:16).
35. Alternative B(a).
36. Alternative B(b). This was the same procedure as was followed when deciding upon the fate of reservations to organizational treaties.
37. It was opposed *inter alios* by Tunkin, ILCYB 1962:I, p. 163(654:31); Jiménez de Arechaga, p. 164(654:37), Lachs p. 165(654:46).
38. Waldock mentioned that the UK government in its comments to the 1962 draft had expressed the desirability of letting the question be settled through international adjudication. ILCYB 1965:II, p. 52.
39. A/CONF.39/C.1/L.133/rev.1.
40. Vienna Conference, 1st Session, p. 128.
41. See the criticism by Bevans, *ibid.* p. 130 (CWh 24:49).
42. Vienna Conference, 1st Session, p. 133. Fenwick (Reservations 1952, p. 122) thought this would be a question for the UNGA.
43. ILCYB 1965:I, p. 161(798:71). It is not correct to assert that the compatibility criterion is without relevance. That the machinery for its establishment is weak does not invalidate the basic rule. It appears to be a typical argument of the 'sanctionist' school. Compare Coccia, p. 25.
44. 'Restricted multilateral treaties' is a term that has been advocated by France. In the reports of the ILC the expression 'plurilateral treaties' has been used. None of these terms has found official recognition. See Egidio's criticism (pp. 20–21) as to the proposed rules on reservations to restricted multilateral treaties trying to reconcile the idea of integrity with the rule of unanimity.
45. 660 UNTS 195. Imbert, (Human Rights, p. 42) has certain doubts as to the role of a collective

- decision-making procedure. The Committee on the Elimination of Racial Discrimination has concluded that it has no authority to determine the inadmissibility of a reservation, UNJYB 1976 pp. 219–221, UN Doc. CERD/C/SR.286.
46. Art. 50(3), 520 UNTS 226.
 47. With respect to European Conventions on Human Rights the Commission and the Court would be able to decide upon the admissibility of a reservation, i.e., also compatibility. Kopetzki (p. 34) agrees with Golsong that there is no danger with a “Schwebezustand” before an organ has pronounced on the validity of a reservation. Nevertheless he prefers a presumption for the validity of a reservation in the absence of objections.
 48. The League of Nations Committee of Experts had already stressed the value of having the treaty contain a provision as to the admissibility of reservations. LoN OJ, July 1927, p. 800. On the difficulties to agree on reservation clauses: Reservations to the 1967 Protocol Relating to the Status of Refugees, Weis, pp. 43–44; reservations to the 1958 Law of the Sea Conventions, UNCLOS I, Summary Records, Vol. 2, 20 PIM pp. 62 and 71(1958), Imbert, Réserves, p. 87ff., Rosenne, Reflections, p. 143ff.; reservations to the 1982 Law of the Sea Convention, Galligan, pp. 369–372, McDorman, pp. 494–497. Certain categories of treaties may more commonly contain reservation clauses. Of 70 conventions of the Hague Conference on Private International Law analyzed by Müller 48 contained reservation clauses (p. 197).
 49. UNCLOS I, Summary Records, Vol 2, the FRG proposal for a general prohibition against reservations (15 PIM p. 45, later modified to read that no reservations were to be formulated to articles 49–60) was rejected at the 15th Plenary Meeting. For the vote on the proposals for more limited prohibitions see pp. 56 and 58.
 50. The Committee of Ministers of the Council of Europe adopted in 1963 the ‘Model Final Clauses of Agreements and Conventions’ which were revised in 1980.
 51. ILCYB 1962:I, Gros p. 149(652:41).
 52. ILCYB 1962:I, Bartos p. 163(654:28).
 53. ILCYB 1965:I, Bartos p. 269(813:89).
 54. Espersen, CCPR/C/SR 30 p. 5.
 55. Advisory Opinion of the Inter-American Court of Human Rights on the Restrictions to the Death Penalty – Articles 4(2) and 4(4) No. OC-3/83 of 8 September 1983; Kokott, p. 830.
 56. A reservation to the arbitration clause of the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas was considered to be an incompatible reservation. ILCYB 1962:I, p. 149(652:42 and 44). Such reservations are actually prohibited by art. 19 of the Convention. This provision is probably the reason why so few states have participated in the treaty. Gamble, Treaty-Making, pp. 550–551.
 57. Pleadings, p. 380, Statement by Shawcross, Holloway, Réserves, p. 187.
 58. See *infra* ch. 22.8.2.
 59. As the ICJ left it to the appraisal of each individual state if the reservation was compatible or not it in fact accepted that a state presenting such a reservation would become a party to the treaty. It is highly improbable that all states will brand such a reservation as incompatible.
 60. The possibility of asking for an advisory opinion remains.
 61. So for example art. 13 of the 1973 Convention on Internationally Protected Persons.
 62. The US government considered the Syrian reservation to the Annex of the Vienna Convention on the Law of Treaties on obligatory conciliation to be incompatible (MT 1985 pp. 733 and 736). The creation of some kind of compulsory disputes settlement procedure was for a number of states the absolute condition for accepting the provisions on *jus cogens* and the invalidity of treaties. See Kearney, pp. 545–550. Sztucki (p. 300) considers the Syrian reservation not to be incompatible. He points out that the US in its later statement of 29 September 1972 does not make any reference to the compatibility requirement.
 63. ILCYB 1953:II, pp. 133–134; ILCYB 1956:II, p. 115.
 64. *Anglo-French Continental Shelf* arbitration, pp. 15–16, Submission of the Government of the United Kingdom on 9 February 1977 paras. 1A(f) and 2(b).
 65. Bowett, p. 77.
 66. For another discussion on the inadmissibility of a reservation and its effects see Perrin, pp. 165ff.

NOTES TO CHAPTER 15

1. The distinction between admissibility (or permissibility) and opposability is described by Bowett (Reservations, p. 88).
2. In the early phase of the drafting of the Vienna Convention no distinction between admission and acceptance was made. The unanimity rule fuses the compatibility requirement with the acceptance. A unanimously accepted reservation must be deemed to be compatible.
3. This is the common view. Imbert (Délimitation, p. 54) presents a contrary view. According to him objections should be permitted irrespective of how specified the authorization is.
4. As in the case of the Swiss reservation to the League of Nations Covenant. It was accepted by unanimous decision by the Council. Documents diplomatiques suisses, Vol. 17 pp. 511–512. For the declaration of the Swiss Federal Council in connection with the plebiscite see pp. 649–651. See also Mowat (pp. 91–93) for a discussion on the Swiss statement.
5. It was not self-evident in the beginning that the confronted states would be able to object to a reservation that was compatible.
6. UNJYB 1976, p. 212. Here is only mentioned that a completely invalid reservation precludes the deposit of an instrument containing such a reservation. Similarly the Joint Dissenting Opinion, ICJ Reports 1951, p. 44; Fitzmaurice stated that a reservation which had on objective grounds been deemed unacceptable (more than 1/3 majority of the interested states) would make the instrument of consent inoperative if the reservation had not been withdrawn within a certain time limit (Fitzmaurice, Reservations, p. 24).
7. The chances for this occurring may be slight.
8. This is a general rule which will not apply to organizational and restricted multilateral treaties nor to treaties where we have specific reservation clauses.
9. See *infra* ch. 16.3.

NOTES TO CHAPTER 16

1. The terms 'restricted multilateral treaties' and 'plurilateral treaties' were not included in the Vienna Convention.
2. See the amendment of the US A/CONF.39/C.1/L.127, Vienna Conference; Documents, p. 127, text of article 17 as adopted by the Committee of the Whole.
3. Vienna Conference, 1st Session, p. 22.
4. The same concerns treaties which accord to international organizations immunities and privileges. See *infra* ch. 28.2.2.
5. For the text of the statement see MT 1985 p. 167. When the constitution of an organization forms part of a wider convention regulating also other matters the question may be put if the general rules on reservations is to apply to all parts of the treaty or if one would have to accept the coexistence of two reservation regimes. See McDorman, p. 496, Hazou, pp. 73 and 77. See Saba, pp. 421–432. Her examples concern mostly statements which are not true reservations, thus the US statement to the WHO Constitution and the South African statement to the GATT Protocol of 9 May 1948.
6. There may arise a problem where the organs of the international organization are not yet in operation. See Spanish amendment CONF.39/C.1/L.148 and the comments by the Spanish delegate Cuenca to the Vienna Conference, 2nd Session, p. 109 (CWh 21:20). See also the discussions within the VIth Committee at the 15th Session of the General Assembly. A state casting a negative vote on the matter will not be able to disregard the reservation. Rosenne, Constitution, p. 62; Mendelson, p. 170.
7. MT 1985 pp. 791–792 n.4.
8. Harvard Draft, p. 870.
9. *Ibid.*, p. 855; ST/LEG/7, p. 31.
10. UNJYB 1971, pp. 233–236, art. 22(6) of the UPU Constitution forbids reservations at any later moment. Art. 17 of the ITU Constitution has also been interpreted in such a restrictive way, Mendelson, p. 138.
11. As for example the ICAO and the WHO.
12. Harvard Draft, p. 894; Sanders, p. 495; Miller, p. 141. For an example see the act of deposit of ratifications of the Brussels General Act on Slavery from 2 January 1890 (1 Bevans 166–168).
13. Report of the Committee of Experts, League of Nations Official Journal, July 1927, p. 880; Harvard Draft, p. 879.
14. Article 33 of the 1925 Opium Convention.
15. The Protocol was open for signature for the members of the League of Nations and the states invited to accede to the Covenant as mentioned in its Annex, PCIJ Ser. D No. 1, p. 4.
16. Article 77(c) of the Vienna Convention.
17. ILCYB 1951:I, Kernö p. 199(105:57).
18. Malkin, p. 159; Owen, p. 1113; Pomme de Mirimonde, Washington, p. 204.
19. This was the view of certain of the members of the ILC in the beginnings of the drafting of the Vienna Convention. ILCYB 1950:I, Hudson p. 93(53:43), Cordova p. 94(53:69 and 94); ILCYB 1951:1, El Khoury pp. 198–199(105:42). Owen (p. 1102 n. 62) mentions that President Wilson stated in the Foreign Relations Committee of the Senate that Germany's silence could not be construed as tacit acceptance of the Senate reservations to the Versailles Treaty. See the examples of the Hungarian and US statements to the Convention on Slavery.
20. Pleadings, pp. 423–424. Exposé écrit de M. Charles Rousseau. See also the statement of the US to resolution X of the Inter-American Council of Jurists from 1959:

“(a) The provision in Paragraph I of the Resolution that the failure of a party of the Convention to reply within a year to a notice of a reservation filed by a ratifying or adhering party shall be construed as acceptance of the reservation, is undesirable.”

21. Pleadings, p. 210. In its statement to the Court Israel declared that a ratification gives rise to

the *presumption* of consent to a preceding reservation.

Herrera Marciano speaks of "aceptación implícita" (p. 110). His "aceptación presunta" would correspond to the tacit acceptance proper mentioned below.

22. The period of 12 months was introduced for the first time in the work of the ILC through the First Report on the Law of Treaties by Waldock, art. 18(3) (b), ILCYB 1962:II, p. 61.
23. Vienna Conference, 2nd Session, p. 37(P1M 11:24).
24. Glennon (p. 265) by analogy from contract law. Whiteman (p. 138) however states that the views of the contracting states have to be sought and obtained.
25. The rule under art. 20(5) of the Vienna Convention on tacit acceptance applies both to paragraph 2 on restricted multilateral treaties and paragraph 4 concerning treaties not containing express authorizations of reservations and not being of the organizational kind.
26. Chaumont (p. 449) states that art. 19 operates "sur le plan de la validité absolue" and art. 20-21 "sur le plan de la validité relative".
27. This was asserted by a number of delegates to the Vienna Conference. Thus for example, the delegate of Jamaica, Rattray (Vienna Conference, 2nd Session, p. 33 (P1M 10:66)).
28. The Convention on Racial Discrimination and a number of customs conventions provide for a collegiate procedure for acceptance of reservations (See for example art. 39(3) of the Convention on Private Road Vehicles, 282 UNTS 274).
29. An exemption from the prohibition without any alteration of the basic prohibition may also be affected by unanimous agreement among the parties, but it will not amount to a revision of the treaty rules as such.
30. A reservation clause could provide the organ such a right to permit derogations from a general prohibition.
31. It has occurred in practice that a confronted state has made a general objection against any reservation that could be considered to be incompatible with the object and purpose of the treaty. Here the objecting state wishes to be sure that a reservation it considers incompatible will not be binding on itself even if it has failed to react towards it. Such objections were made by Israel on ratifying the 1958 Conventions on the Territorial Sea and the High Seas.
32. ILCYB 1962:II, p. 50; ILCYB 1965:I, p. 146(796:38).
33. For formulation see ILCYB 1965:I, p. 145(796:33).
34. ILCYB 1962:II, pp. 51 and 65.
35. First Report on the Law of Treaties by Waldock, art. 17(2) (a), (UN Doc. A/CN.4/144) ILCYB 1962:II, p. 60.
36. Vienna Conference, Documents, p. 27.
37. Liang, Third Session, p. 486.
38. A/CONF.39/C.1/L.115.
39. A/CONF.39/C.1/L.169 and Corr. 1.
40. A/CONF.39/C.1/L.133/Rev.1.
41. The provision in this amendment resembles the rule on tacit acceptance under art. 17(5) of the Draft, as it limits the right to invoke the incompatibility to be exerted within 12 months. In the original version (A/CONF.39/C.1/L.133) the time limit was 3 months.
42. A/CONF.39/C.1/L.127.
43. See Swiss amendment A/CONF.39/C.1/L.97.
44. Vienna Conference, 1st Session, p. 132 (CWh 24:77).
45. Ibid., p. 133 (CWh 25:4).
46. Vienna Conference, Documents, p. 27.
47. A/CONF.39/C.1/L.97.
48. According to Alchurrón & Bulygin it is a defect in the norm system which consists of the absence of a solution (p. 146). It is not a case of a gap of recognition which is the result of semantic indeterminacy. We have to deal with the so-called "rechtsfreien Raum", Larenz, p. 245.
49. This problem has been touched upon during the discussions at the 4th Colloquy of the Department of Human Rights at the Catholic University of Louvain, 7 December (par. 7) on the validity of reservations under art. 64 of the European Convention on Human Rights. The problem was if the question of the invalidity of a reservation has to be referred to the organs of the Council of Europe within the period of tacit acceptance under art. 20(5) of the Vienna Convention. Golsong solved the problem by considering the Vienna Convention inapplicable to the European Convention according to the principle of non-retroactivity. Here it is sub-

- mitted that the rule on tacit acceptance is not applicable due to the existence of a normative gap.
50. That is if the international tribunal is competent to go beyond the valid law deciding *ex aequo et bono*.
 51. See supra ch. 22.10.
 52. See discussion above on the elements of international custom, infra ch. 2.a.
 53. Vienna Conference, Documents, p. 137; 1st Session, p. 135 (CWh 25:30).
 54. Some writers like Nisot (p. 202) state simply that expressly authorized reservations are considered accepted by all other states.
 55. It is possible that incompatible reservations may be presented to provisions to which reservations are permitted. Where a clause prohibits that a provision is 'excluded' but a state presents a 'modifying' reservation it could well be a reservation that violates the purpose of the treaty.
 56. See comments by various delegates to the conference. Vienna Conference, 1st Session: Jagota(India) p. 128 (CWh 24:29), Bevans(USA) p. 130 (CWh 24:48 and 53), Kebreth(Ethiopia) p. 134 (CWh 25:15).
 57. MT 1985 pp. 696-697.
 58. ETS 29, ECA I, pp. 278-279.
 59. ETS 51, ECA II, p. 213.
 60. Similar options we find in the 1957 European Convention on Peaceful Settlement of Disputes (ETS 23, ECA I, pp. 165-166). Art. 34 provides that a contracting state may choose those parts it will not be bound by. Statements under art. 34 are termed "declarations". When a state notifies which kind of disputes as mentioned under art. 35 it wishes not be governed by the convention they are termed "reservations".
 61. Müller, pp. 18-19. Droz, p. 406ff.
 62. 496 UNTS 48, art. 5(3) and 6(2), 2(1).
 63. ETS 35, ECA I, pp. 350-351.
 64. 96 UNTS 240.
 65. The treaty creates two regimes and a contracting state may choose between them.

NOTES TO CHAPTER 17

1. See *supra* ch. 2 n.15. Disapproval may either be a formal objection according to the terms of the Vienna Convention having the legal effects under art. 21(3) or a simple protest which does not have these effects.
2. It is difficult to say if a protest may have some kind of legal effect. In the case of protests against interpretative declarations, a formally communicated protest may be of relevance in future disputes concerning the correct interpretation of an imprecise provision. A protest counteracts any possible effect of acquiescence.
3. Sinclair mentions the possibility that a small state may not qualify its objection due to fear of pressure from the reserving state. The same argument may be valid where a small state has the choice between objecting or remaining silent which would result in tacit acceptance (VC I, p. 43) See *infra* ch. 20.
4. Mark, however, that all the 16 statements to the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity are gathered under the heading: "Declarations". The Secretary-General has apparently taken a stand as to the nature of these statements not considering them to be reservations. The statements all concerned articles V and VII on participation in the convention. As submitted above in this work, statements to participation clauses are not considered as reservations.
5. Declarations concerning non-recognition of territorial claims have been made by Argentina vis à vis the UK as concerns the Falkland Islands, Guatemala as concerns former British Honduras, now Belize. Declarations of non-recognition of regimes have been made by various states in connection of the signing of conventions by the Pol Pot regime in the name of Kampuchea.
6. MT 1985 p. 750.
7. MT 1985 p. 752. Here the Israeli protest was mentioned in a note. This has been the procedure in many other cases. However the protests have also been listed as "objections". See for example the Israeli protest against the Moroccan declaration of non-recognition in connection with the Vienna Convention on the Law of Treaties. (MT 1985 p. 734).
8. Discussed *infra* in connection with the reciprocity principle ch. 26.3.1.2.b.
9. MT 1985 pp. 651 and 658.
10. Statements as of 12 May 1980 and 11 March 1982.
11. *Ibid.*, and statement of 15 April 1982 on approving the Natural Rubber Agreement.
12. During the preparatory work Tunkin argued for the need to confirm an objection. ILCYB 1965:I, p. 167(799:38).
13. It appears from treaty practice that such objections are often not repeated. See the disapprovals in connection with the Convention on the Political Right of Women.
14. It could have a significance where the objection was a qualified one, for example excluding the whole or a part of the treaty from applying between the objecting and the reserving state.
15. ICJ Reports 1951, pp. 28–29.
16. UN Doc. A/1372, p. 7 para. 38. ILCYB 1963:II, p. 20 para. 18;
17. As during the 3rd Session of the ILC, ILCYB 1951:I, pp. 190–193, 195–198, 201–203, 206–208. Frequently reference was made to "interested states", without specifying what was meant by "interested". Occasionally it has been admitted that there are certain difficulties in determining which states are the ones that have an interest in the matter (Pleadings, p. 312, Statement by Kernö). At least according to the 'signatory rule' all the signatory states had an interest in the treaty. The group of interested states could be the signatories, the states invited to sign, the states invited to participate, the states having ratified in various combinations.
18. The League of Nations Report of the Expert Committee to the League of Nations spoke of the "contracting parties" without specifying which states are meant (Pleadings, p. 349). Presumably the Committee had in mind both the signing states and all states being party to the treaty. Fenwick (Report, p. 122) was in favour of the right for all signatories to object.
19. UN Doc. A/1372, pp. 7–8.
20. The question of objections was discussed at the 651st to 654th meetings of the ILC. The fight

- came more to stand between the majority rule and the flexibility rule, than between the unanimity rule and the flexibility rule. Waldock drew up two alternative rules on the basis of the discussions at the 653rd meeting. See ILCYB 1962:I, p. 162 (654:16).
21. Pleadings, p. 39, Written statement by the US; ILCYB 1950:I, p. 96(53:105)
 22. ILCYB 1951:I, pp. 190 and 191(104:100, 101 and 114).
 23. The third state ratifying was Monaco on 5 July 1950.
 24. It means that states after the treaty has entered into force may not object to prior reservations that all the other parties have accepted, as pointed out in the report by the Secretary-General (UN Doc. A/1372).
 25. ILCYB 1951:I, François p. 191(104:106), Hudson p. 190(104:102).
 26. ILCYB 1951:I, p. 190(104:104).
 27. So for example the Indian amendment, Vienna Conference, 1st Session, p. 128 (CWh 24:32).
 28. This is the case where there are no means to settle in an authoritative way the question of incompatibility of reservations. It is strange that some socialist writers who have propagated for the sovereignty principle maintain at the same time that objections by all contracting parties exclude the reserving state from the treaty. A consistent view would consider a reserving state even in this case a party to the convention with the exclusion of the relevant provision with respect to all contracting states. Juridicheskii slovar, p. 34. Levin & Kaliuzhnaia, p. 89.
 29. It could as well be contended that the state is a party to the treaty, but that the treaty becomes only operative for this state with the next unqualified instrument of ratification or accession.
 30. Art. 20(4) of the 1954 Customs Convention on Touring states that an objection of a signatory state ceases to have effect if the signing state has not ratified the convention within 9 months from the date of making objection.
 31. UN Doc. A/1372, p. 3. The difficulty of determining what is a reasonable period has been stressed from time to time. Statement by Rosenne, Pleadings, p. 355. A reasonable time limit for transmitting one's views according to the early practice of the Secretary-General was either a) the date on which the instrument of ratification or accession of the reserving state was to take effect, if the agreement in question made provision for such an interval, b) when a special time limit was specifically fixed according to the requirements of the case or c) or when he requested the states concerned to inform him of their attitude "as soon as possible" (ST/LEG./7, p. 32 para. 59).
 32. See *supra* ch. 17.3. In Brierly's Report on Reservations to Conventions (UN Doc. A/CN.4/41) Part IV(2) and (5), ILCYB 1951:II, pp. 16–17. The time limit for objecting and construing tacit acceptance was left open.
 33. The 1950 Convention on the Declaration of Death of Missing Persons provided for a period of 90 days (art. 19) as did the 1957 Convention on the Nationality of Married Women (art. 8). The 1928 Convention on Economic Statistics (art. 17) and the 1937 Convention for the Prevention and Punishment of Terrorism (art. 23) provided for a 6-month period. UNESCO conventions provide for 6 months and FAO conventions for 3 months (UN Doc. A/5687 pp. 94, 95 and 98).
 34. 13 LNTS 18, Hudson IL IV, pp. 2706–2708, Hudson IL VII, p. 862, Hudson IL VIII, p. 280.
 35. This was probably the reason why the UN Secretary-General chose the period of 90 days for the consultation procedure that was introduced in order to determine the date of entry into force of treaties to which reservations had been presented. See *infra* ch. 28.2.1.
 36. Lauterpacht's First Report on the Law of Treaties (UN Doc. A/CN.4/63) art. 9(II) alternative draft A(3), B(1), alternative draft C(2), alternative draft D(2), ILCYB 1953:II, pp. 91–92; Fitzmaurice's First Report on the Law of Treaties (UN Doc. A/CN.4/101) art. 39(2), ILCYB 1956:II, p. 115.
 37. UN Doc. A/CN.4/144, art. 19(3), ILCYB 1962:II, p. 62.
 38. See ILCYB 1960:II, p. 133.
 39. Yasseen considered the 12-month period to be too short (ILCYB 1965:I, p. 160(798:54)). This view was shared by Elias (ILCYB 1965, p. 161(798:66)). Waldock believed the period not to be unreasonable taking into consideration that some treaties provided for shorter periods of 3 and 6 months (ILCYB 1965:I, p. 165(799:17)). It was according to him in the general interest to keep the period of uncertainty as short as possible. For efforts of governments to define what is a 'reasonable' time for objecting see Whiteman 14, p. 185.
 40. This combination of 'implied acceptance' and 'tacit acceptance proper' we find already in Waldock's First Report on the Law of Treaties, ILCYB 1962:II, p. 62.

41. Rosenne drew this question to the attention of the other member of the ILC. ILCYB 1965:I, p. 268(813:67).
42. UN Doc. A/5209, ILCYB 1962:II, p. 176, art. 19(4).
43. See for example the comment by Castrén. ILCYB 1965:I, p. 168(799:52). The Australian government in its comments on the 1962 Draft was of the opinion that there should be no obligation to object before the *treaty was in force* and the confronted state itself a party to the treaty, ILCYB 1965:II, p. 45.
44. See for example the formulation in the Model Final Clauses of the Council of Europe from 1963 (Art. (d) (3) and from 1980 (Art. (e) (2) "on the date of receipt of the notification by the Secretary-General". For example in art. 36(2) of the 1977 European Convention on the Legal Status of Migrant Workers (ETS 93, ECA IV p. 84).
45. The point was taken up by Waldock on the 813th meeting of the ILC, ILCYB 1965:I, p. 269(813:73 and 74).
46. For the distinction between 'withdrawals' and 'abandonments' see *infra* ch. 23.4. When the UN Secretary-General states that Ecuador "withdrew" its reservations upon ratification to paragraphs 2, 3 and 4 of art. 37 of the Vienna Convention on Diplomatic Relations formulated at the time of signature is not really correct (MT 1985 p. 66 n.10). A reservation is formally presented on ratification and may only from that date on have legal effects. A reservation notified on signature but not confirmed on ratification is abandoned.
47. This view was advanced at the 1962 session of the ILC by Rosenne, ILCYB 1962:I, p. 145 (651:79) and p. 174(656:22) and seconded by Tunkin p. 156(653:26) and Waldock p.159 (653:60) and p. 163(654:24). It was reiterated during the 1965 session, ILCYB 1965:I, p. 167 (799:37) and Waldock p. 169(799:65). Rosenne on the other hand did abandon his view, p. 159(798:46). The Canadian government commenting on the draft articles of parts I–III was also of the view that objections should be bound by the compatibility criterion, ILCYB 1965:II, p. 46.
48. The Australian, Danish and US governments in their comments on the ILC draft articles from 1962 and 1963 were advocating a freedom to object, ILCYB 1965:II, pp. 45–47.

NOTES TO CHAPTER 18

1. A reservation accepted by the competent organ will become binding and opposable also to a state which has voted against acceptance. Rosenne, *Constitution*, p. 62.
2. See *infra* ch. 14.3.
3. Imbert, *Réserves*, p. 250 n.46; Schermers, p. 356.
4. Art. 65(2) (c) states that the Sugar Council may decide by special vote if a reservation is to be accepted and is also to decide upon solutions which to a certain extent may lighten the undertakings of the confronted states.
5. Similar reservations were entered into by New Zealand, Pakistan, the Netherlands, the United States, the Republic of Korea and Uruguay. The reservation by the UK was withdrawn by a note dated 14 December 1971, received on 15 December 1971. Rosas, p. 118.
6. MT 1985 p. 72.
7. MT 1985 p. 522.
8. MT 1985 p. 242.
9. Vienna Conference, 2nd Session, p. 181 (PIM 33:10).
10. *Ibid.*, p. 181 (PIM 33:9).
11. See *infra* ch. 27.3, view expressed by Yasseen at the Vienna Conference.
12. This touches upon the problem of separability of treaty provisions. In the written statement to the ICJ in the *Reservations* case the opinions were divided in the matter. Rosenne believed it possible to distinguish between "normative" and "contractual" parts. Reservations to contractual parts were admissible and presumably they did not affect the normative parts. (Pleadings, p. 356). Fitzmaurice considered it difficult to make the distinction. Art. IV of the Genocide Convention as well as art. I and VII were both normative and contractual. (Pleadings, pp. 402-404).
13. The question is, if the other provisions whose interpretation is affected by the reservation are excluded from being applied between reserver and objector. It would be an unreasonable solution. The only effect should be that the reserved provision may not be invoked as a means of interpretation.
14. See *infra* ch. 22.8.2.

NOTES TO CHAPTER 19

1. Reservations are assumed to create particular regimes. With respect to certain kinds of treaties, such as demilitarization and commodity treaties, they may also affect the relations between the confronted states *inter se*.
2. Scott, p. 143; Pomme de Mirimonde, *Traité imparfait*, p. 66.
3. Pomme de Mirimonde, *Traité imparfait*, p. 65f.
4. Fauchille, *Jurisprudence britannique*, pp. 4–5.
5. *Ibid.*, pp. 3–4; similarly the *Leda* (20.11.1914) p. 58; the *Roumanian* (7.12.1914) p. 73.
6. Fauchille, *Jurisprudence française*, the *Porto* (10.11.1914) p. 2; the *Barmbeck* (8.12.1914) p. 5; the *Frieda Mahn* (29.12.1914) p. 7; the *Martha Brockhahn* (29.12.1914) p. 9 and the *Czar Nicolai* (29.12.1914) p. 13.
7. Pomme de Mirimonde, *Traité imparfait*, p. 24; Pillet, p. 81.
8. Bulgaria, Italy, Montenegro, Serbia and Turkey had not ratified the Convention. However it has been contended that the norms of the convention without being formally binding continued to be applied between the warring states on the basis of reciprocity. Tobin, p. 32.
9. Hudson II, p. 1120.
10. 179 LNTS 105. Each of the three related protocols contain identical provisions. Article 4 of the Protocol Relating to Certain Cases of Statelessness (179 LNTS 119).
11. The Model Final Clauses of the Council of Europe states the reciprocity principle in a negative way: “A Party which has made a reservation . . . may not claim the application of that provision by any other party . . .”
12. 93 LNTS 343.
13. OASTS-16, p. 17.
14. Art. 34(2) and 35(1), ETS-23, ECA I, art. 34, pp. 165–166.
15. ICJ Reports 1957, pp. 23–27; ICJ Reports 1959, p. 25.
16. ICJ Reports 1952, pp. 103–104.
17. PCIJ Ser. A/B No. 74, p. 22; PCIJ Ser. A/B No. 77, p. 81. The reciprocity principle may operate in a positive or negative way. With respect to jurisdiction clauses there is no doubt that the negative effect is the one intended. If two declarations on compulsory jurisdiction vary, jurisdiction is conferred to the court or tribunal according to the one with the more limited scope (*Anglo-Iranian Oil Co.* case, ICJ Reports 1952, p. 103). In all the above-mentioned cases the World Court maintained the reciprocity principle. As a matter of fact, the principle of reciprocity was not applied in all these cases although the Court had recognized its value. The state having entered the more limited declaration was invoking the benefit of its own declaration. Only in two cases was there any true application of the proper reciprocity rule, i.e., a party was invoking the more restrictive declaration by the other party. In the *Electricity Company of Sofia and Bulgaria* case Bulgaria was invoking the benefits of the limitations *ratione temporis* in the Belgian declaration. In the *Norwegian Loans* case Norway was invoking the benefits of the limitations concerning domestic jurisdiction in the French declaration.
That the reciprocity principle does not have to apply absolutely without exceptions is mentioned by Bernhardt (*Gegenseitigkeitsprinzip*, p. 620) and Hambro, p. 185ff.
18. 276 UNTS 240–242.
19. See *infra* ch. 19.3.1.2.a.
20. Art. (d) (3) of the 1963 Model Final Clauses and art. (e) (3) of the 1980 Model Final Clauses of the Council of Europe.
21. MT 1985 p. 365.
22. 268 UNTS 44.
23. 330 UNTS 48.
24. 597 UNTS 58.
25. Imbert, *Réserves*, p. 252.
26. De Luna pointed out the insufficiency of the reciprocity principle in connection with “law-making treaties” (ILCYB 1962:I, p. 152(652:76)). Majoros (p. 80) for example finds it peculiar that the ILC had not looked closer at the question of reciprocal effect of reservations.

27. In legal doctrine Bishop spoke against a categorical rule of reciprocity (p. 253). A more nuanced view also from Kappeler, *Réserves*, pp. 76–82.
28. The early writers only give a hint as to the reciprocal effect of reservations. See Pomme de Mirimonde, *Traité imparfaits*, pp. 62–63; Malkin, p. 161; Scheidtmann, p. 69 and v. Crayen, pp. 35–37.
29. Correlativity does not entail reciprocity, Simma, p. 52. Niboyet (p. 267) mentions as example of unilateral treaties (“*traités sans contreprestation*”) such political treaties which concern peace, cession of territory and concessions. He admits though that even such treaties have a reciprocal element, which may for example consist in the obtaining of peace (p. 267 n.1).
30. 695 UNTS 193.
31. 402 UNTS 72.
32. The mutual character of a norm may be expressed in the following words: “Each contracting state shall recognize . . .”. Thus art. II of the Convention on the Recognition and Execution of Foreign Arbitral Awards.
33. 48 UNTS 230.
34. Both identically and equivalently reciprocal treaties may factually be unequal. See Kröger, p. 256ff.
35. Niboyet (p. 270.) prefers the term ‘symmetric’ to ‘identical’ reciprocity.
36. Fitzmaurice, *Reservations*, p. 14. See also Pleadings (p. 64) Written Statement of the UK to the ICJ.
37. 55 UNTS 194.
38. The atomization or fragmentation may be effected with respect to both equivalently reciprocal and identically reciprocal treaties.
39. 479 UNTS 101 at 194.
40. 479 UNTS 99, art. 1, pp. 100–102, art. 10, pp. 106–108.
41. Fitzmaurice, *The Law*, p. 278.
42. China tried to make a reservation to the Versailles Peace Treaty but failed in her efforts. China did not belong to the vanquished states. See Miller, p. 166. Szafarz (*Reservations*, p. 302) states that peace treaties should not be governed by the usual rules on admissibility of reservations. Art. 75 of the Vienna Convention provides for exceptions with respect to aggressor states.
43. And provided that they are not nationals of the receiving state.
44. Portugal abandoned its reservation, Denza, p. 230. For the efforts within the Permanent Juridical Committee of the Arab League to cooperate in the matter of reservations see Moussa, pp. 192–193.
45. The insight of this benefit of reciprocity may have been the reason for the withdrawal of the Portuguese reservation. However, Portugal belongs to the small states that do not have the possibility to keep large missions abroad. National legislation may debar a state from invoking the benefits of the reciprocity principle. Thus the Swedish Statute on Immunities and Privileges in Certain Cases (SFS 1976:661 of 10 June 1976). Paragraph 2 states that members of diplomatic missions, their families, their servants and diplomatic couriers shall enjoy immunity according to the provisions of the Vienna Convention. Paragraph 3(2) however permits the government to make exceptions from the immunities to be granted consuls, their families and servants as well as consular couriers with respect to those sending states which are not parties to the 1961 Convention or have become parties subject to reservations. The 1964 Diplomatic Privileges Act (section 31) of the UK confirms to the British government the power to withdraw privileges and immunities from missions in London and persons connected with them if the privileges and immunities accorded to the UK mission in the sending state are less than those prescribed by the 1961 Convention. Denza, p. 230.
46. This is a good example where formal, identical reciprocity does not amount to real reciprocity, i.e., the distribution of equal charges and burdens. Where a small state may have to grant privileges and immunity to 50 persons belonging to the technical and administrative staff, it may perhaps be able to demand such benefits for only one person. The law of the sea conventions prove that geographical factors may be disadvantageous for certain states, as for example the land-locked states. Decaux (p. 56), Simma (p. 120ff.) and Modinos (p. 72) do discuss the same problem.
47. Perhaps the free transit and movement of representatives of states to the international organization could be construed as mutually operating rights.
48. Any of the rights under art. IV section 11 of the Specialized Agencies Convention (333 UNTS

- 270). The obligations of the convention have been characterized as being absolute. The state where the conference is held is not able to deny the right of a state not party to the convention to send a representative. UNJYB 1964 pp. 266–268; UNJYB 1963, pp. 188–191; UNJYB 1965, pp. 234–256.
49. See *infra* ch. 28.2.2.
50. Investment and establishment agreements thus differ from other commercial treaties which as a rule will only provide equivalent reciprocity (Modinos, pp. 70–71).
51. The revised draft from 1965 of the ILC states under its art. 21:
- “1. A reservation established as effective under the provisions of articles 18–20 operates:
- (b) Reciprocally to modify the provisions of the treaty to the same extent for each party to the treaty in its relations with the reserving State.” (emphasis added).

The wording seems wider than in the Vienna Convention. The reciprocal effect could bear on other provisions than the ones directly indicated by the reservation.

52. Art. 64 (647 UNTS 82) and art. 68 (882 UNTS 99).
53. Any dispute as to whether a reservation vitiates the economic functioning of the treaty has according to art. 65(2) (b) to be settled under the procedure established by art. 57 (654 UNTS 98).
54. The Council would be able to determine how far the confronted states may be freed from certain obligations vis à vis the reserving state.
55. Fitzmaurice, Reservations, p. 15; Pleadings, Written Statement by the UK, p. 69, Rosenne, p. 335, Shawcross, pp. 378 and 384; ILCYB 1959:II, p. 4; Anderson, D.R., p. 467.
56. McCormick, Rights, p. 206.
57. Residents are not always guaranteed the same rights as nationals. The Civil Rights Covenant speaks in its art. 25 on political rights of voting, etc., of “citizens”, whereas it usually speaks of “everyone” and “all persons”.
58. Lauterpacht in his First Report on the Law of Treaties, ILCYB 1953:II, p. 127. Decaux states that when we are moving from a bargain situation towards a greater solidarity we do not any longer have a partial reciprocity of *do ut des* but a general reciprocity (p. 61).
59. Simma, p. 82.
60. ICJ Reports 1951, p. 23.
61. For a more precise presentation of the concept of transformation and adoption of treaties see Espersen, pp. 132–150 and 421–426; O’Connell I, pp. 49–51.
62. Violations of human rights may in a very concrete way affect the well being of other states. An increase in the flow of refugees results in a growing economical and social pressure on those states which receive the refugees.
63. Articles 25 and 44 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5, ECA I, pp. 29 and 33. 87 UNTS 103.
64. Articles 44 and 61, Serie Sobre Tratados No. 36.
65. Usually such treaties establish one-sided legal relations: duties on the side of the state, and rights for the subjects. See Cohen-Jonathan who argues that reciprocity does not work with respect to the European Convention of Human Rights (p. 335).
66. The situation is naturally different where an international organization enters into a treaty with states and becomes a proper party to it.
67. Similarly the American and European conventions on human rights do as a rule not make any distinction between nationals and non-nationals. Imbert, La France, p. 37.
68. For a presentation of the conditions for diplomatic protection see Nascimento e Silva, p. 63.
69. This may be the case where the reserving state does act against the norm that has been ‘excluded’ by a reservation.
70. See art. 41(1). Communications under this article may be received and considered only if submitted by a state party which has made a declaration recognizing in regard to itself the competence of the committee.
71. The Statute of the ICJ mentions in art. 36(2 and 3) the condition of general reciprocity but says nothing as to the reciprocal operation of other limitative declarations.
72. So for example art. 13 of Convention III Relative to the Treatment of Prisoners of War.
73. Pictet, Commentary III, p. 141; Kalshoven, p. 321.
74. ‘Derogation’ is used as a general term for designating a situation where a state acts contrary

- to an obligation as formulated in the treaty text. A violation or a breach is an unlawful derogation. A reservation once accepted is a lawful derogation from the original obligations.
75. Art. 2(2) of the Covenant on Economical, Social and Cultural Rights; art. 2(1) of the Covenant on Civil and Political Rights.
 76. It is therefore submitted that human rights treaties are not by definition void of mutual effects.
 77. MT 1985 p. 135.
 78. Up to 1962 only those citizens of the UK and Colonies (CUKC) which had a valid passport issued by the UK government were allowed to enter the UK. The 1968 amendment to the Immigration Act denied the right of entry even to such CUKC's if they did not have any ancestral connections with the UK. Many East African Asians were thus barred from entering the UK. The Nationality Act of 1981 introduces the concept of *British Citizen* (in contrast to *British Subject*) which is to be largely identical with the concept of *Patrial* in the 1971 Immigration Act. See MacDonald & Blake, p. 2. In the *East African Asian* cases the applicants contended that the 1968 Immigration Act was discriminatory and thus arbitrary. See also Nambiar, p. 61. The applicants were either CUKC's or British Protected Persons holding UK passports. The British Government did not consider the European Convention on Human Rights to guarantee the right of entry to nationals. Art. 3(2) of the 4th Protocol however which reads that "No one shall be deprived of the right to enter the territory of the State of which he is a national" had not been ratified by the UK. The European Commission of Human Rights considered the complaints admissible. The UN Covenant differs from the 4th Protocol by prohibiting only "arbitrary" deprivation of the right of entry.
 79. Sri Lanka with a notification of 11 June 1980 and the United Kingdom with a notification of 20 May 1976, MT 1985, pp. 138.
 80. A contracting state may recognize the competence of a court or a tribunal unconditionally or on the condition of reciprocity. This is the case with the European Convention on Human Rights (art. 46(2)). The same holds true with regard to the Inter-American Court of Human Rights under the 1969 American Convention on Human Rights (art. 62(2), OASTS 36). The competence of the Human Rights Committee is only based on the principle of reciprocity. Only a party having itself recognized the competence of the Committee may bring a matter to its consideration with respect to another party having recognized the competence.
 81. Once there are different views as to whether a statement derogates from a norm there will be a problem of interpretation. See *infra* ch. 25.8.3.
 82. The relevant declarations were made by:

Denmark	6 April	1978
Finland	19 August	1975
Iceland	22 August	1979
Norway	31 August	1972
Sweden	26 November	1971

Further states having recognized the competence of the Committee as of 31 December 1984 are: Austria, Canada, Ecuador, FRG, Luxembourg, Italy, the Netherlands, New Zealand, Peru and Senegal.

83. *Pfunders* case, 4 *Annuaire de la Convention Européenne des Droits de l'Homme* 1961, p. 139.
84. Walter pp. 48–55 and further pp. 55–98. See also Walters review of Gerd Langer's book: "Die Beteiligten in dem Verfahren vor dem Europäischen Gerichtshof für Menschenrechte", 26 *ZaöRV* 1966 p. 802; Simma, pp. 179–181, 185–187 and further 188–219; Bernhardt (*Gegenseitigkeitsprinzip*, p. 626) favours the view of the Commission.
85. Certainly the "objektive Verpflichtungstheorie" mentioned by Simma and Walter could not be pushed very far. A member of the Council of Europe not party to the Convention would clearly not have the right to claim any violation.
86. The *si omnes* clause was inserted into most of the Hague Conventions:

1899 Convention	II art. 2	1907 Convention	IV art. 2
	III art. 11		V art. 20
			VI art. 6
			VII art. 7
			VIII art. 7
			IX art. 8
			X art. 18
			XI art. 9
			XII art. 51
			XIII art. 28

87. See for example art. 11 of the 1899 Hague Convention on Maritime Warfare according to which:

“The rules contained in the above articles are binding only on the contracting Powers, in case of war between two or more of them.

The said rules shall cease to be binding from the time when, in war between contracting Powers, one of the belligerents is joined by a non-contracting Power.”

and art. 18 of the 1907 (X) Hague Convention:

“The provisions of the present Convention do not apply except between contracting Powers, and then only if all belligerents are parties to the Convention.”

88. Pictet, Commentary I, p. 26ff; Pinto DRI, p. 344; Draper, p. 72, La Pradelle, La Conférence, p. 183.
89. Simma, p. 110; Schwarzenberger, Armed Conflict, p. 99 n.21, Stone, Legal Controls, p. 354; Kalshoven, pp. 362–363.
90. Except for the express prohibitions reprisals seem to be generally accepted. It may however not be tactically wise to make use of reprisals in order to avoid escalation.
91. States affirming the principle of reciprocity with regard to contracting states and in the case where a party fails to respect the prohibitions of the Protocol: Australia, Belgium, Bulgaria, Canada, Chile, Fiji, France, India, Iraq, Ireland, Israel, Jordan, New Zealand, Nigeria, Libya, Papua New Guinea, Portugal, Romania, South Africa, United Kingdom, USSR and Viet Nam.

States affirming the principle of reciprocity only in the case of violation: Czechoslovakia, Kampuchea, Kuwait, Mongolia, Netherlands, USA and Yugoslavia.

States affirming the principle of reciprocity in general terms: People's Republic of China and Spain.

92. 6 UST 3214, 6 UST 3314, 6 UST 3514, 6 UST 3694.

93. The US statement had the following formulation (see Pilloud, Reservations, pp. 112–113):

“Rejecting the reservations which States have made with respect to the Geneva Conventions . . . the United States accepts treaty relations with all parties to that convention, except as to the changes proposed by such reservations.”

Does this wording mean that the US accepts treaty relations with the exception of the reserved norm and the proposed change or that the change, i.e., the proposed new norm, is excepted while maintaining the original norm. In the first case the reservation would be considered to be impossible, in the second case null and void. Does the statement of the US make us assume that the reservations were incompatible? Most of the reservations had been presented at signature and were known at the moment of formulating this statement. If the reservation was really believed to be incompatible the formulation would have been more explicit. In the Congress however it was clearly stated that the conventions would apply to the reserving states with the exception of the reserved provisions (USCR 84:1, Vol 110 part 8, pp. 9970–9971). On the other hand, it must be remembered that the reservation and the reactions to them date usually back to the period when the rules on reservations were not yet crystallized. According to Baxter the US Senate did not consider the reservations incompatible with the “effect that no treaty relationships would arise”. The statement is a proposal to “agree to disagree” leaving the

- subject-matter unregulated (Baxter, Geneva Conventions, p. 554).
94. Imbert, Réserves, p. 257.
 95. Vienna Convention art. 60.
 96. Final Record of the Diplomatic Conference of Geneva of 1949; Vol. II section B, p. 10.
 97. Baxter & Buergenthal, p. 870; Meyrowitz, Égalité, p. 139.
 98. The question of the division of the *ius in bello* into humanitarian and non-humanitarian law was discussed at the 1963 session of the ILI, 50:1 Annuaire IDI 1963 pp. 5–127, 50:II Annuaire IDI 1963, pp. 306–356, resolution of the IDI at p. 368. See further Bindschedler, p. 79 n.1; Schwarzenberger, Armed Conflict, p. 98ff.; Meyrowitz, Égalité, pp. 131–135.
 99. Provided that the reservation is not incompatible, in this case the application of the reservation will amount to a breach.
 100. Bindschedler, pp. 83–85.
 101. Simma, p. 106; Kalshoven, p. 23f; Meyrowitz, Égalité, p.139.
 102. Simma, p. 107.
 103. Schelling, pp. 58–67, subchapter on tacit bargaining and chapter 4, pp. 102–104.
 104. SIPRI Yearbook 1985, p. 525.
 105. The reserving state may not make use of its reservations and thus there would be no reason for the confronted states to invoke the reciprocity effect of reservations.
 106. However reservations to art. 68 of the IV Geneva Convention reserving the right to impose the death penalty in occupied territory irrespective of the local laws is a reservation to a norm of primarily humanitarian character. There are weighty reasons not to apply the principle of reciprocity, which would have the character of reprisals.
 107. See Vienna Convention art. 60(2).
 108. Where a state reserves its right of free transit of nuclear weapons through a demilitarized or denuclearized area it may well upset the whole treaty regime. Senate Hearing before the Committee on Foreign Relations, 97 Congress 1 Session, Senate Executives I, 95–2, 1981, p. 6, Statement of Department of State Legal Adviser Davis R. Robinson.
 109. This is the general rule which we find established in the Vienna Convention art. 60(2) (c). There may though be many exceptions to this rule depending on the circumstances of the treaty.
 110. The problem is closely linked with the question of separability of treaty provisions.
 111. The question may be put if a state could exclude a limited territory from the denuclearized zone without this endangering too much the implementation of the treaty.
 112. See for example art. 8(3) of the 1968 Non-Proliferation Treaty which stipulates that 5 years after the entry into force of the treaty a conference should be convened in order to review the operation of the treaty. After that a majority of the parties may at intervals of 5 years initiate the convening of further conferences.
 113. A further method is to let the treaty remain in force for a certain period, with the possibility of prolongation.
 114. Imbert, Réserves, p. 259.
 115. MT 1985 p. 559.
 116. The 1961 Single Convention provides a procedure for determining the admissibility of reservations.
 117. Liang, UN Practice, pp. 108–121; Rosenne, Treaty Practice, pp. 378–379. Imbert rejects the “colonial reservations” not because they only affect the implementation *ratione personae*, but because he cannot accept ‘extensive reservations’; Gomez Robledo, p. 13.
 118. See *supra* ch. 13.2.
 119. This would directly follow from the general rule of reciprocity inserted in art. XIV.
 120. Gormley, Negotiated Reservations, p. 65ff.
 121. Art. 7 of the 1946 Convention on Night Work of Young Persons (Non-Industrial Occupations).
 Art. 7 of the 1948 Convention on Night Work of Young Persons (Industry).
 Art. 9 of the 1946 Medical Examination for Young Persons Convention (Industry and Non-Industrial Occupations).
 122. The substantive inequality between members may be remedied by the formal inequality as regards treaty commitments. Colliard (p. 309) calls such inequality “*inégalité compensatrice ou protectrice*”.
 123. Förordning om utländska statsfartygs och statsluftfartygs tillträde till Sveriges territorium m.m. SFS 1982:755.

- According to art. 14 of the new 1984 Soviet Rules for Navigation and Sojourn of Foreign Warships in the Territorial and Internal Waters and Ports of the USSR, the requirement of prior authorization is not absolute: "The prior authorization of the USSR Council of Ministers shall serve as the grounds for admittance of foreign warships in the internal waters and ports of the USSR unless another procedure has been provided for by international treaties of the USSR or by decision of competent Soviet agencies on the basis of the principle of reciprocity." See 24 ILM 1985 p. 1718.
124. Förordning N:o 185:1963 om övervakning av rikets land- och vattenområden samt lufttrum.
 125. Instructions sur l'application du droit international en cas de guerre adressés par le Ministre de la Marine à MM, les officiers généraux, supérieurs et autres, commandant les forces navales et les bâtiments de la République, en date du 19 décembre 1912, art. I(6). To be found also in the superceding instructions from 30 January 1916, In Fauchille, *Jurisprudence française*, Fasc. II, Annexe, p. III.
 126. Espersen (pp. 134–138) analyzes how the various terms have been used. In Nordic legal doctrine the term 'transformation' and 'incorporation' are common. Usually they denote the form in which the treaty obligations have to be put before becoming applicable by the national authorities. 'Transformation' means that the treaty rules are reiterated in the form of a national statute. 'Incorporation' means that the treaty as such is applicable, but after a formal decision of reception into the national legal system: The treaty is given the status of a municipal statute or the executive is given the power to enter a treaty which is admitted to have the effect of a statute. NOU 1972:16, p. 33; SOU 1974:100, pp. 10–11.
 127. Holmberg & Stjernquist, p. 178. 'Transformation' is used as a general term and 'incorporation' is only a special mode of transformation. Transformation is subdivided into 'transformation proper' and 'incorporation'. See note above.
 128. Rousseau, DIP 1970, pp. 166–169.
 129. *Ibid.*, p. 178.
 130. The supremacy of treaties was also stipulated by articles 26 and 28 of the 1946 Constitution.
 131. "Les traités . . . ont . . . une autorité supérieure à celle des lois, sous réserve, pour chaque accord ou traité, de son application par l'autre partie." The question whether French courts may independently find out if and how another party applies the treaty has met with different views in doctrine and inconsistent practice by French courts (Lagarde, pp. 28–29 and 35–37). Lagarde proposes that the courts should leave both the determination of the presence or absence of reciprocity (i.e., application by the other party) and the choice of application or non-application of the treaty by France to the authority of the French government (pp. 39–40).
 132. Espersen, pp. 328–329, 424–445.
 133. There may be also political reasons for not making use of reciprocity.
 134. Art. 20(1). Droz, pp. 400–403; Müller, pp. 131–132, 136. With respect to the 1928 Inter-American Convention on Private International Law (Codigo Bustamante) see Samtleben, p. 104.
 135. House of Commons, First Report of the Foreign Affairs Committee, Session 1984–85. The Abuse of Diplomatic Immunities and Privileges, pp. xxx–xxxii, Memorandum by the Foreign and Commonwealth Office, p. 4; White Paper Cmnd 9497, Misc. No. 5(1985), Diplomatic Immunities and Privileges, Government Report on the Review of the Vienna Convention on Diplomatic relations and Reply to "The Abuse of Diplomatic Immunities and Privileges". See also Higgins, Abuse, p. 648 and Higgins, Report, p. 136.

NOTES TO CHAPTER 20

1. Articles 6 and 7 spoke of reservations as "acts inherent in national sovereignty", though this was understood as not obliging other parties to accept them. Belaunde, pp. 48–49.
2. Cited in Belaunde, pp. 49–50: Ruda, *Reservas*, p. 22.
3. The term 'maximum effect', and 'minimum effect' of objections in the government observations of Czechoslovakia and Romania on Parts I, II and II of the 1962 draft articles (UN Doc. A/6009, ILCYB 1965:II, pp. 48–49). They were also used at the Vienna Conference (Vienna Conference, 1st Session, Nachabe p. 110 (CWh 21:35). See also Ruda, *Reservas*, p. 77; Szafarz, *Zastrzeżenia*, pp. 244–245, *Treaty Practice*, pp. 256–259 and Nieto Navia (p. 10). La Guardia & Delpech (p. 257), however, speak of the "regla panamericana máxima" and mean by this a rule which gives the treaty maximum application between reserver and objector, the treaty applies with the exception of the provision concerned. The "regla panamericana minima" is the one that gives minimum application to the treaty between reserver and objector (i.e., none) and maximum effect to the reservation (p. 258). La Guardia & Delpech use the terms exactly in the opposite way as later on used in the drafting history of the Vienna Convention. The "regla panamericana media" makes the reservation exclude all treaty relations, but gives the objector the possibility to opt for a limited effect of the reservation (p. 263).
4. Ruda, *Reservas*, p. 120f. See also Gomez Robledo, p. 25.
5. *Ibid.*, pp. 123–128.
6. Resolución X para. I(c), OEA Doc. 11, 9 noviembre 1959, Undecima Conferencia Interamericana, Quito, Ecuador 1960, "Normas relativas a la formulacion de reservas a los tratados multilaterales", Union Panamericana, Washington D.C. 1959 (hereinafter cited as Normas). Normas, I(4)(c) p. 2.
7. ILCYB 1962:II, p. 62.
8. ILCYB 1962:I, p. 162 (654:16).
9. UN Doc. A/5209, Report of the ILC Concerning the Work of its 14th Session, 24 April–29 June 1962, ILCYB 1962:II, p. 175.
10. UN Doc. A/CN.4/1.77, ILCYB 1975:II, pp. 48–49.
11. ILCYB 1965:I, Tunkin p. 167 (799:39), Lachs p. 268 (800:62), Waldock p. 166 (799:20), p. 173 (800:31) and p. 268 (800:66).
12. ILCYB 1965:I, p. 284 (816:49). An objection that is only intending to preclude only the relevant provision from applying may be termed a 'simple objection'. Coccia calls it a 'relative objection' (p. 23). An objection that intends to preclude the whole treaty from applying may be called a 'qualified objection'.
13. A/CONF.39/C.1/L.115, L.85 and L.94.
14. Vienna Conference, Documents, p. 137.
15. A/CONF.39/L.3.
16. Vienna Conference, 2nd Session, p. 221(CWh 88:34).
17. *Ibid.*, p. 35(PIM 10:79).
18. During the plenary meeting the delegates of Mexico (Suarez), Ecuador (Valencia-Rodriguez) and Venezuela (Carmona) openly declared their support for the Soviet amendment. *Ibid.*, pp. 31–33.
19. Belgium for example thought it necessary to clarify that its disapproval of the statements of the United Arab Republic and Cambodia to art. 37(2) of the Vienna Convention concerning administrative and technical personnel would not preclude the entry into force of the convention with the exception of the provision concerned (MT 1985 p. 57). The United States notified on 2 August 1955 that it would reject reservations by other states to the four Geneva Conventions on the humanitarian law of war from 1949 but accept treaty relations with all parties "except for the changes proposed by such reservations." Information obtained by the Swiss Federal Department of Foreign Affairs. For the text of the reservations see 6 UST 3214, 3314, 3514 and 3694.
20. ILCYB 1965:I, p. 173(800:31); Vienna Conference, 2nd Session, p. 34(PIM 11:74).
21. Sinclair VC II, pp. 240–241.

22. *Ibid.*, p. 43.
23. ILCYB 1965:II, p. 271(814:5).
24. *Ibid.*, p. 174(800:40).
25. *Ibid.*, p. 173(800:25).
26. *Ibid.*, p. 272(801:10).
27. Vienna Conference, 2nd Session, p. 365(P1M 11:5). See also Yasseen's comment at the 17th Session of the ILC, ILCYB 1965:II, p. 272 (814:10). Waldock was unable to accept Yasseen's view as he could not conceive of a situation where a state would object well knowing that its objection would have the same effect as that of an acceptance (814:19). He was probably not aware of the factual effect of the then secondary rule of minimum effect which would make the effect of objection in the case of 'excluding' reservation illusory. The construction of contraregulation by reservation and deregulation by objection as presented in the present work was not considered by the drafters.
28. A/CONF.39/L.49, Vienna Conference, Documents, p. 273.
29. Vienna Conference, 2nd Session, pp. 179–180(P1M 32:54–55). The delegate of the Netherlands, Maas Gesteranus, considered the alteration of the Drafting Committee to be an error and containing no substance (P1M 32:56). He was wrongly referring to interpretative statements having presumed 'modifying' reservations in mind. See criticism by the UK delegate Vallat, p. 180(P1M 32:65).
30. Ignoring the rare case of 'qualitatively modifying' reservations, we have to admit that the distinction between 'excluding' reservations and 'restricting' reservations is hard to make. A reservation which 'excludes' a subparagraph of an article is 'restrictive' with respect to the whole provision, read article, but 'excluding' with respect to the norm expressed by the subparagraph. This depends naturally on the contents of the article. The whole article may be seen as encompassing a general norm, where the subparagraphs provide specific exemplifications of or exceptions to the general rule.
31. Ruda, Reservations, p. 199; McDorman, p. 502; Zoller, p. 308; Sondaal, p. 53.
32. MT 1985 p. 322. Zoller, p. 371.
33. See Imbert, Réserve, p. 16 n.31.
34. MT 1985 p. 537.
35. The general norm to publish statistics on external trade may be understood to be the sum of norms obliging to publish statistics on special import, special export, general trade, transit trade.
36. Harvard Draft, p. 874. See *infra* ch. 3.2.
37. 510 UNTS 181; Droz, p. 405; Müller, p. 50.
38. It could also be construed as a 'restricting' reservation to the more general norm of the freedom of the seas under art.2.
39. It may however be the case where the objecting state considers the reservation to be incompatible and therefore void. Where a compulsory procedure for the determining of the nature of a reservation is at hand as in the case of the Convention on Racial Discrimination there will be a possibility to maintain the original norm invalidating the reservation.
40. Take for example a case where an objecting state would lay cables on the Iranian continental shelf. Actually Iran's reservation on signature remains without legal effect as Iran has not ratified the 1958 Law of the Sea Conventions, but this fact does not affect the argument.
41. This is however not the case if the reservation states that the matter shall be regulated as hitherto.
42. Chaumont (pp. 448–449) comes close to this view when stating that "... la clause objet de la réserve demeure en quelque sorte en suspens entre l'auteur de la réserve et l'Etat objectant. Il reste seulement une possibilité d'accord futur."
43. MT 1985 pp. 680–682.
44. The question whether reservations may be effective where they refer to provisions codifying international custom is discussed by Thirlway (pp. 121 and 123). Thirlway believes the dictum of the ICJ in the *North Sea Continental Shelf* case to be too categorical when the Court states that reservations cannot be entered into "... in the case general or customary law rules and obligations which by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by anyone of them in its favour." (ICJ Reports 1969, pp. 38–39 para. 63). He accepts well a derogation from general customary law by means of special

- agreement, but denies the right of reservation to provisions containing rules of *jus cogens* or concepts of general law which are necessary for the operation of concrete norms of conduct.
45. Cassese mentions simply that an objection in such a case has no effect, without taking into consideration the distinction made in the present work that the inoperation of art. IX may depend on different reasons (Su alcune, p. 299).
 46. MT 1985 pp. 733–734.
 47. As done by Sweden, Egypt, Finland, Canada, Japan, New Zealand, USA, UK. MT 1985 pp. 733–736.
 48. A/CONF 39/L.49; A/CONF 39/11 Add.1. p. 181, P1M 33:4.
 49. Imbert, Réserves, pp. 157–158. The effect of the change is to refer the burden of proof to the objecting state. Neuhold, p. 69.
 50. A/CONF.39/L.49.
 51. Vienna Conference, 2nd Session, p. 181(P1M 33:4).
 52. *The Anglo-French Continental Shelf* arbitration had to consider the excluding effect of unspecified objections. France considered the objection to exclude all treaty relations whereas the UK considered the entire convention to be applicable.
 53. OAS General Assembly Proceedings Vol. I, OEA/Ser.P/III -0.2, 15 April 1973 Vol. I.
 54. MT 1985, p. 733–734.
 55. MT 1985, p. 732.
 56. Rey Caro considers that the objection of Argentina to the Syrian reservation was not really necessary because Argentina had made a similar reservation as Chile limiting the application of the *rebus sic stantibus* principle whereas the Syrian reservation was widening its application. Although Rey Caro finds that it is difficult to determine the legal effects where a state objects to the reservation by another state to the same provision to which it has itself presented a reservation the only reasonable solution would be to consider the matter deregulated.

NOTES TO CHAPTER 21

1. Shawcross stated during the proceedings before the ICJ in the *Reservations* case that even if a state loses little in the way of concrete benefits by not becoming a party to a normative treaty, it "... does at least forego a certain status, and certain advantages which, if of an intangible character, are, nevertheless very real ..." (Pleadings, p. 379). This was the reason for Shawcross to defend the unanimity rule at least in respect to human rights treaties. He considers it also unjust that a state by participating in human rights treaties would profit from a positive image while at the same time freeing itself from significant obligations under the treaty.
2. Vis à vis individuals reservations are always opposable. See *Ofner* case where an individual wanted to invoke the invalidity of a reservation. The only means is to declare the reservation inadmissible or incompatible.
3. This has now quite recently occurred with respect to certain reservations formulated to the Discrimination Convention. Mexico and the FRG invoked the incompatibility of a number of reservations.
4. Many of the negotiating states at the Vienna Conference believed that the procedure under art. 66 and the Annex of the Vienna Convention is crucial for the whole operation of the Vienna Convention that they thought it necessary to make qualified objections to these reservations. The disapproving states were not just satisfied with the right to disengage from the procedures of the settlement of disputes with respect to the reserving state but felt it necessary to express their dissatisfaction by denying the bindingness of any of the rules under part V.
5. See chapter 20 n.31.
6. Maxims which form part of the general principles of international law may help close the system. The resort to analogies may also be considered a system-closing device. The principle 'that what is not forbidden is permitted' so frequently applied in internal legal systems cannot be transplanted to international law. Rousseau DIP I 1970, p. 378. Bos points out the contradictions in the cases before the World Court (Theory, pp. 139–140). He admits that the above-mentioned principle is not a logical precept. It is however a fundamental choice "as to the basic assumptions underlying the legal order", a choice he himself seems to favour. The device that may close the legal system is primarily of a political character. In a liberalistic society there will be wider support for considering all acts that are not formally forbidden as permitted under the law. Another society may however follow the opposite maxim that all acts that are not expressly permitted are forbidden.
7. The exploration of the ocean floor for example may be free and possible only to states having the necessary technology. Other states may not be able to prevent such activities and may contend themselves to verbal criticism.
8. Had the UK made an objection to the Libyan reservation regarding the inviolability of the diplomatic pouch (considering it invalid and therefore ineffective) the British government would not have been able to benefit from the reservation on the basis of reciprocity. The objection may be withdrawn but it must be remembered that such a withdrawal becomes operative only after the other contracting state has received notice of it. See supra p. 169.

The Fletcher incident raises an interesting question. The Libyan reservation to article 27(4) of the Diplomatic Relations does in fact reintroduce a norm of customary diplomatic law that existed before the entry into force of the Diplomatic Relations Convention (makes the former customary law applicable). But what would the effect be of such a reservation once objected to as done by the Soviet Union and Canada. The reservation makes the new rule inapplicable and the objection would make the reservation and thus prior customary law inapplicable. Here we would find that both the new treaty norm and the old customary law are excluded from applying. Similarly as accepted reservations, objections, may go against a norm of customary law not having a peremptory character. An objector state may just have backed the treaty norm as it no longer will accept the former customary norm.
9. See supra ch. 16.2. For Córdova's view on tacit acceptance see ILCYB 1950:1, p. 93(53:54).
10. A withdrawal must be formulated in writing (Vienna Convention art. 23(4)) and notified to the contracting states.

There are occasions where a state must be considered to have withdrawn its objection without specific notification to this effect. A state having formerly objected to reservations of a certain kind may through a change in its political regime have come to make similar reservations which the former regime had objected to when presented by other states. Cuba is such a case where the objections of the Batista regime had been 'forgotten'. See ch. 23.5. n.32.

A reservation probably loses its relevance once the legislation has been brought in line with the treaty provisions. This is only the case if there is no withdrawal because the existence of a reservation has been overlooked. A reservation may continue to be valid though not operative if in spite of the harmonizing legislation the state wants to maintain its discretion to change the relevant legislation later on.

11. Sondaal touches upon this problem (p. 53). It seems however doubtful if a state objects to an excluding reservation knowing that its objection has no effect. A state considering a reservation invalid, may not apply that reservation for its own benefit which would thus be contrary to the principle of *bona fides*. If the objecting state comes to the conclusion that its objection will only have harmful effects it may always withdraw it.
12. The Netherlands has frequently resorted to this method. See *infra* ch. 27.4.

NOTES TO CHAPTER 22

1. It is strange that it has not become a more common practice.
2. MT 1985 pp. 732–736. These statements have been both listed as declarations and objections. The Tanzanian statement is not very clear, but it resembles a general objection.
3. MT 1985 pp. 734–736. Chile made a general objection to reservations formulated to art. 62(2) on the *rebus sic stantibus* principle.
4. Ibid., p. 98.
5. Ibid., p. 688.
6. Ibid., p. 97.
7. Ibid., p. 98.
8. Ibid., p. 674.
9. Ibid., p. 735.
10. Declarations concerning non-recognition (Israel, Taiwan, Pol Pot regime) have not been counted. The UN Charter and amendments (I:1–2,5) and the ICJ Statute (I:3–4) have not been counted.
11. MT 1985 pp. 768–769. (See chs. 3 n.53 and 28.2.4. n.56)
12. IATC A–24, p. 40.
13. OASTS No. 34.
14. IATC A–24, p. 40.
15. Loc. cit.
16. The statement was with respect to these articles obviously not containing reservations but interpretative declarations.
17. For the discussions within the OAS about the reservation regime see ch. 28.3.1.
18. Standards, Section C(3).
19. UN Doc. A/5687, Depositary Practice in Relation to Reservations. Report of the Secretary-General. The reply of the Council of Europe to question 14. ILCYB 1965:II, p. 96.
20. The status as of 31 December 1985. Treaties with less than 10 statements have not been considered.
21. Democratic Yemen, Iraq, Kuwait, Libya and Syria made statements which beside a declaration of non-recognition of Israel comprised other declarations or reservations. Denmark's statement concerning the implementation of the convention on the Faeroe Islands was withdrawn in 1972 and has not been counted. MT 1985 p. 114 n.8.
22. MT 1985 p. 113 n.2.
23. Lately there has been an increase in the number of objections to statements made to the 1979 Convention against the Discrimination of Women. It is however too early to conclude that there has been a real change in attitude. Most of the statements are not proper reservations. See ch. 29.
24. As a result of the resolutions adopted by the IMCO Assembly on 14 November 1975 (A.358(IX)) and 9 November 1977 (A.371) the name of the Inter-Governmental Maritime Consultative Organization (IMCO) was changed on 22 May 1982 into International Maritime Organization (IMO). In the present work the abbreviation IMCO has been used whenever the action or event described has occurred before this date. Though there had been an exchange of views on the Indian, Indonesian, Cambodian, Malaysian and Ceylonese statements they have not been regarded as being the object of formal objections or protests.
25. See MT 1985 pp. 722–725. The former part of the statement is a declaration *ratione personae* and thus no proper reservation, the latter case may be construed as a genuine reservation.
26. Bilder, p. 569ff.
27. MT 1985 pp. 564–567.
28. Cassese comes to the same result but on slightly different grounds (Su alcune, p. 306). The declaration does not restrict but enlarges the obligations. Protests do similarly have no effect and art. VII applies. Szafarz discussing the Polish statements to the Convention (both articles VII and IX) comes to the conclusion that the Convention is not applying between Poland and the objecting states (Treaty Practice, p. 256).

29. See 276 UNTS 365. The instrument of ratification of the Philippines with the objection was deposited on 12 September 1957.
30. See *infra* ch. 28.2.1.
31. They appear to be the most common type of reservation clauses.
32. We have optional protocols to for example the Diplomatic and Consular Convention and the International Covenant on Civil and Political Rights.
33. One reason may also be that such a state has changed its opinion as to the reservations. This will not be easily ascertained on the basis of the information that is provided by depositaries. Objections are very seldom withdrawn. See *infra* ch. 23.5.
34. Socialists states stressed very much the absolute character of the inviolability of the diplomatic pouch. For the Soviet Union see Romanov, p. 79
35. Denza, pp. 229–230; MT 1985 pp. 56 and 66 n.13. Portugal probably withdrew its reservation due to the negative effects objections would have on its own position.
36. Greece had on signature formulated a reservation to the effect that the last sentence of art. 37(2) was not to apply. This reservation was not maintained on ratification. Instead Greece objected to the reservations by Cambodia, Morocco, Portugal and the United Arab Republic to the whole of art. 37(2). MT 1985 p. 66 n.12 and p. 60.
37. The reservation of the People's Republic of China which had been objected to referred to paragraphs 2,3 and 4 of art. 37 concerning the administrative and technical staff and the private servants. The People's Republic notified the Secretary-General in a communication received on 15 September 1980 that it withdraws its three reservations to art. 37 (MT 1985 p. 66 n.9)
38. See *supra* ch. 22.1.
39. Japan also specified the articles affected by the disapproved reservations. This was not done by Madagascar.
40. Japan exemplified its disapproval by also mentioning the statement by Italy to art. 24 of the Territorial Sea Convention. This statement would appear to be a genuine reservation.
41. That is, the subsequent reservations by the GDR and Mongolia.
42. Madagascar would thus also be considered to have objected to the reservations by Albania, Mongolia and the GDR.
43. See *infra* ch. 26.1.L.
44. Stating that their disapproval concerned all incompatible reservations will not be much of a help before it is clarified what kind of reservations the disapproving states finally consider to be incompatible.
45. See the statements of Denmark, Finland, Japan and Sweden, MT 1985 pp. 732–736.
46. Thus the figures will not directly tell how many 'types' of statements have been disapproved. A state following a consistent objection practice will naturally come up to a higher figure than a state objecting sporadically.
47. They did though reformulate the UK disapproval of the Indonesian statement. MT 1985 pp. 687–689.
48. The Nordic countries harmonized their reactions against the reservations concerning the disputes settlement procedures under the Vienna Convention.
49. Where a disputes settlement or 'remedial' norm forms part of a treaty which only concerns various forms of disputes settlement it may be considered to be a substantive norm. The opinions may vary as to how closely the material norms are intertwined with the remedial or enforcement rules. Where states consider that these secondary norms are an essential condition for the effective functioning of the treaty they may consider that reservations have effects which also extend to the material norms and will make objections.
50. Declarations of territorial application may be of the kind that qualifies them as reservations. See *supra* ch. 13.2.
51. MT 1985 pp. 60, 65 and 568.
52. Except for the Netherlands. MT 1985 p. 98.
53. Art. VII.
54. MT 1985 p. 567, In MT 1982 p. 511 Israel is stated as only having objected to statements as far as they concern the disputes settlement clause.
55. MT 1985 p. 588.
56. MT 1985 p. 678. See p. 95.
57. Such as Bulgaria, Byelorussia, Hungary, Romania, Ukraine and the USSR.

58. Australia, the Netherlands, Fiji, Tonga, UK and USA. MT 1985 pp. 680–683.
59. See *supra* ch. 17.4.
60. See however the British reaction to the GDR statements to the Law of the Sea Conventions which would suppose that the UK felt obliged to react within a certain period. See p. 207 n.67. Within the US Senate and the Department of State we encounter views that assume the 12-month rule to apply. Hearings before the Committee on Foreign Relations, United States Senate, 96th Session, Executive C,D,E and F 95–2. Four Treaties Relating to Human Rights November 14,15,16 and 19,1979, Washington 1980 p. 44 (Hearings 1979).
61. The rigidity of the 12-month rule may be remedied by construing it as a rule of presumption.
62. See chs. 27 and 27.3.
63. The UN publication on the status of multilateral conventions does not provide conclusive information. With respect to the treaties on customs matters and road traffic information is missing as to the dates when formal disapprovals have been received. According to the publication objections have been made on the date of ratification if not otherwise mentioned. With respect to the 1953 Convention on Political Rights of Women some of the objecting states had ratified the convention before the reserving state so the objections and protests must have occurred after the ratification of the former. Information is not provided in the MT of the dates of these later objections.
64. Rosenne pointed out the difficulty to determine exactly the moment a state has been notified of a reservation. ILCYB 1965:I, p. 268(813:67). Rosenne proposed that any notice communicated by the depositary to the states concerned shall become operative 90 days after the receipt of the instrument to which the communication relates. This period of 90 days would allow for the observance of the normal administrative practices of the depositary and for receipt of the notice by the authorities of the states concerned. Thus a confronted state would be deemed to have received notice of a reservation after 90 days from which the depositary would have received the instrument containing the reservation. UN Doc. A/CN.4/L.108, ILCYB 1965:II, p. 73.
65. It is based on the assumption that all statements were containing reservations. This is certainly not the case. The 12-month period will not be applicable to declarations short of reservation. See *infra* ch. 27.1.
66. MT 1985 pp. 678 and 685. The statement to the Continental Shelf Convention concerned the participation clause. MT 1985 p. 695.
67. MT 1985 pp. 682 and 690.
68. There may further be a considerable lapse of time between the date the formal reaction is sent and the date when the depositary receives it.
69. MT 1985 p. 136. The FRG had ratified the Covenant on 17 December 1973.
70. MT 1985 pp. 82 and 84–85. The principle of non-retroactivity of the Vienna Convention may create some problems in the future. Will the tacit acceptance rule apply in cases where both the reserving and the objecting state is a party to the Vienna Convention and the reservation has been formulated after the Vienna Convention has entered into force, but the treaty to which the reservation refers has been concluded before that crucial date?
71. In 1978 a US Marine Guard, considered to belong to the administrative and technical personnel of the US Embassy in Morocco, was charged with murder of another US citizen on Moroccan soil. The US government considering the Moroccan reservation to art. 37(2) of the Diplomatic Relations Convention to be invalid did not recognize Moroccan criminal jurisdiction in the case and the Marine Guard was sentenced by a US Military Court. David Glaser considers the US objection to the Moroccan reservation to art. 37(2) to be invalid because it was communicated too late (pp. 315–317). The Moroccan reservation dates from 19 June 1978. The US ratified the Diplomatic Relations Convention on 13 November 1972 and notified its objection on 2 July 1974. Thus the objection came six years after the reservation and 1½ year after the US ratification. David Glaser refers to the position taken in 1962 by the Department of State on a French objection to a US reservation to the 1954 Convention for the Prevention of Pollution of the Sea by Oil when the Office of Treaty Affairs declared:

“It is the view of this Government that the objection of the French Government made more than two years after it knew the terms of the proposed United States reservations, more than six months after it had received official notification of the deposit of the United States acceptance subject to those reservations, and more than three months after the Convention had entered into force for the United States . . . was not made within a *reasonable* time. It is therefore without any legal effect on the status of the United States” (emphasis added).

David Glaser holds that the Vienna Convention rules under art. 20(4) as well as the OAS Standards from 1973 though not operating retroactively still "reinforce the State Department . . . rules" (p. 316). This view is hard to accept. The DoS memorandum expresses no binding rule but a simple view in a specific case, a view that cannot be said to have been accepted more widely, nor to be in accordance with the rules in the Vienna Convention or the OAS Standards. On the contrary, objections may be made within one year and not only within 6 months from the date of notification of the reservation. According to the VC the US objection should have been presented on the date of ratification, 13 November 1974. However the objection cannot be declared invalid due to untimely presentation as the rules on tacit acceptance can hardly be considered to be part of customary law. If recognizing the reservation and objection as valid it means that the status of the technical and administrative personnel remains unsettled.

72. MT 1985 pp. 684, 686 and 688.
73. The Convention was however concluded before the entry into force of the Vienna Convention.
74. He will consider it against his instructions under the UNGA resolutions from 1952 and 1959 to decide if the disapprovals have been too late. See *supra* ch. 28.2.
75. Vienna Conference, Documents, p. 28.
76. *Ibid.*, p. 28 notes 81–82.
77. Normas, I(3), p. 1.
78. Harvard Draft, p. 852.
79. ILCYB 1962:I, pp. 174(656:31); ILCYB 1965:I, p. 160(798:54). Capotorti however believed the time limit to be absolute (p. 30).
80. In such a case the UN Secretary-General would be obliged to refuse the registration of a late objection.
81. The incompatibility may be established by submitting the question to an international tribunal for a binding decision or to an objective collegiate procedure according to the provisions of the treaty itself or to the competent organ of an international organization. It is less likely that the compatibility may be determined by a unanimous opinion by all the other parties. This could be possible in the case of the so-called plurilateral treaties. The question remains how far the reserving state has to recognize such a decision with respect to other treaties.
82. The Netherlands could however contend that only the reservation was null and void.
83. Communication by the US government from 29 May 1971 (MT 1985 p. 736). The disapproving statements of a general content were the ones by Denmark, Finland, Japan, Norway and Sweden. See ch. 22.5. n.45.
84. The preparatory work would suggest that the statement is declarative. Certain African states presented an amendment that would have exempted liberation fighters from the rules of the convention. The Western states opposed this amendment. A compromise was reached by accepting UNGA Resolution 3166(XXVIII) which expressed an approval of the activities of liberation movements as such. At the same time the idea of having a reservation clause was abandoned. See the Finnish Government Bill No. 77/1978 concerning the ratification of the Convention. US reservations to which other states have objected excluding all treaty relations have in later times been extremely rare. See statement by Jack Goldklang, Attorney Adviser, Office of the Legal Counsel, Department of Justice. Hearings 1979 p. 56.
85. MT 1985 pp. 97–98.
86. MT 1985 pp. 684–687. See *infra* ch. 26.1.L. Albania, Bulgaria, Byelorussia, Czechoslovakia, GDR, Hungary, Mongolia, Poland, Romania, Ukraine and USSR.
87. See also the Philippines statement to the 1982 Law of the Sea Convention. MT 1985 p. 712.
88. See *infra* chs. 25.2.1 and 2.

NOTES TO CHAPTER 23

1. Many reservation clauses do not state when a withdrawal becomes effective. So for example the reservation clause in the 1951 Refugees Convention (art. 42(2)), in the 1954 Convention on Stateless Persons (art. 38(2)) and in the 1961 Single Convention on Narcotic Drugs (art. 50(4)).
2. Thus the European Convention on Extradition art. 26(2) (ETS 24, ECA I, p. 183), the 1959 European Convention on Mutual Assistance in Criminal Matters art. 23(2) (ETS 30, ECA I, p. 292).
3. The 1973 Munich Convention on the Grant of European Patents contains in its art. 167 a very detailed reservation clause. As a rule reservations authorized shall have effect only for a period of not more than ten years. Reservations under art. 167(2)(a and b) which make it possible to declare European patents on chemical, pharmaceutical or food processes or on agricultural or horticultural processes ineffective or revocable may be extended for another period of five years by the Administrative Council on the basis of a reasoned request by the reserving state which convinces the Council that the state is not in a position to dispense with that reservation by the expiry of the 10-year period.
4. Szafarz mentions that a maximum effect objection may be changed into a minimum effect objection (Reservations, p. 314).
5. This is frequently the case when national legislation is changed and does not any longer conflict with the treaty. For 'forgotten' objections see *infra* ch. 28.5.
6. Basdevant, p. 597; Guggenheim, *Traité* Vol. I, p. 81; Rousseau, DIP 1944, p. 299, Sibert, *Traité* Vol. II, p. 199; Cereti, pp. 11–12 (as a rule, if not permitted by a treaty); Khadjenouri, pp. 84–85; Scheidtmann, p. 71; Podestá Costa, p. 51; Pomme de Mirimonde, *Traité*s imparfaits, pp. 92–93; Hoijer, p. 147.
7. Ago spoke against a unilateral withdrawal in the case two or more identical reservations had been formulated. In such a case the acceptance of at least the other reserving states had to be obtained (ILCYB 1951:I, p. 175(800:51)). This argument was refuted because identical reservations have their independent existence. The withdrawal of one could in no way affect the fate of the others. *Ibid.*, Rosenne p. 176(800:63), Tunkin p. 176(800:70), Castrén p. 177(800:72) and Waldock p. 177(800:78).
8. Jenks, pp. 476–477. See also Schermers, p. 358.
9. Vitta, pp. 74–77.
10. Chailley, *La nature* pp. 68,320–321,328,332. On the limitations of the theory of 'actes contraires' see Weis, p. 57, Yasseen, ILCYB 1964:I, p. 193(753:23). Sinclair (VC II, p. 183).
11. Verdross was in principle against unilateral withdrawal. ILCYB 1965:I, p. 175(800:49).
12. ILCYB 1965:I, Verdross p. 175(800:49).
13. Observation by the British government on draft art. 22 on withdrawal of reservations. ILCYB 1965:I, pp. 174(800:46–47) and 176(800:60).
14. Art. 22 was finally adopted by 16 votes to none. ILCYB 1965:I, p. 285(816:71).
15. Art. 65(2)(c) of the 1968 International Sugar Agreement.
16. Withdrawal takes effect not on receipt by the Secretary-General but on receipt of notification by the informed states. Many reservation clauses state that withdrawal enters into force on receipt by the depositary. During the Vienna Conference there were opposing views as to whether 'constructive' or 'actual' notice should be the rule (Rosenne, *Depositary*, pp. 940–941).
17. The Final Draft of the ILC was not considered to be clear in this respect. Art. 20(1) of the Final Draft stated that withdrawal "... becomes operative only when notice of it has been received by the other contracting States." It was altered to read: "... becomes operative in relation to another contracting State only when notice of it has been received by that State." The Final Draft left some doubts as to whether the withdrawal would become effective from the date the first confronted state had received the notice or from the date the last one had received it.
18. It is part of the 1963 and 1980 Model Final Clauses of the Council of Europe.

19. The usual formula had been that the withdrawal becomes effective on the 60th day after notification, but has been altered so as to become effective at the first day of the third month from notification. E.g. art. 20(4) of the 1965 Convention on the Choice of Court, art. 33(2) of the 1970 Convention on the Taking of Evidence Abroad in Civil and Commercial Matters and art. 28(3) of the 1978 Convention on Celebration and Recognition of the Validity of Marriages. Similar time lapses may also be found in reservation clauses such as art. 167 of the 1973 Convention on the Grant of European Patents and art. 64 of the 1970 Washington Patent Cooperation Treaty.
20. Rosenne's proposal, see *supra* ch. 22.9 n.64.
21. British observation on art. 22 of the 1962 draft, ILCYB 1965:II, pp. 55–56.
22. ILCYB 1965:I, p. 174(800:43). It was supported by Tsuruoka p. 175(800:54). Against the period of grace were Ruda, p. 176(800:59), Amado, p. 176(800:60), Tunkin p. 176(800:68) and Briggs p. 177(800:76).
23. ILCYB 1965:I, Waldock p. 273(800:24 and 28).
24. Imbert (*Réserves*, p. 290) states that with respect to non-mutual treaties a reserving state could freely determine when it considers its withdrawal to become effective.
25. Vienna Convention art. 22(3)(b).
26. Denmark withdrew successively all its reservations to the 1951 Refugees Convention. MT 1985 p. 181 n.10. Norway had to present a reservation (15.1.1952) to art. 9 of the European Convention on Human Rights concerning Jesuits which could be withdrawn on 4.12.1965 after the Norwegian legislation had been changed in this respect. There was thus no need to formulate a similar reservation to the UN Covenants.
27. Fiji maintained all other reservations except the one formulated to art. 17(2) extending from 3 to 4 years the period for acquiring the rights under the provision, art. 21(1) and 21(2) of the Refugees Convention and art. 21(1)(b) of the Convention on Stateless Persons. The correctness of the term withdrawal of reservations may be questioned in the case of succession. A state succeeding 'formulates' its own reservations. They may or may not concur with the reservations entered into by the metropolitan state in the name of the dependant territory. In principle these reservations may be objected to.
28. MT 1985 p. 188.
29. *Ibid.*, pp. 790–792, 792 n.9. See ICJ Pleadings 1973, *Trial of Pakistani Prisoners of War*, pp. 51–53, 143.
30. Statement of the Government of India of 4 June 1973, ICJ Pleadings 1973, pp. 149–150.
31. Thus Pakistan would still have been bound by the reservation entered into by British India and the Court without jurisdiction.
32. Imbert mentions this example as a case of "objections oubliées", (*Réserves*, p. 293).
33. On 6 December 1984 Australia withdrew parts of its statement to the Covenant on Civil and Political Rights (MT 1985 p. 145 n.4). The Netherlands have not (yet) withdrawn their relevant objections and protests.
34. 189 UNTS 137; MT 1985 p. 176.
35. MT 1985 p. 181 n.12.
36. *Ibid.*, pp. 685–686, 687–689.
37. *Ibid.*, p. 689.
38. The notifications of Fiji and Tonga were almost identical.

NOTES TO CHAPTER 24

1. Miller, p. 79; Fauchille, *Traité*, p. 312; Hoijer, p. 46; Anzilotti, p. 401. Anzilotti presented later a more modified view (Curso 1955, pp. 335–336); Baldoni, pp. 362–365, Genet, pp. 101–102 and p. 320; Strupp, p. 376; Cereti, p. 8; Chailly, *Théorie*, p. 316; Bustamante, p. 432, tomo III p. 411; v. Crayen, pp. 6 and 10; Podestá Costa, p. 3; Rousseau, DIP 1944, p. 291; Sibert, *Traité*, pp. 197, 199; Cavaré, tome II, p. 77; Triska, p. 82 n.112; Moreno Quintana, p. 550; Belaunde, p. 15; Ferrer Sanchis, p. 11; Wolgast, p. 812. See also Díez de Velasco, *El sexto*, p. 1033.
2. Gubin, *Sovetskii*, pp. 128 and 142. (Göttling's understanding of a not too clear definition, pp. 35–36). Gubin considers that reservations "introduce certain changes into the relation directly or *indirectly*" (emphasis added). Apparently interpretative declarations would introduce indirect changes.
3. Hackworth, pp. 101–103; Hyde, p. 1436; Fenwick, IL 1965, p. 527; Fitzmaurice, *The Law*, p. 273 "statements of intention" are only reservations where they alter the substantive content or application of the provision affected. Holloway, *Réserves*, p. 103; Khadjenouri, pp. 21–24; Durdenevskii, *Soglasie*, pp. 101–102 (in Göttling, p. 23); K voprosu, pp. 99–100. Whether Filippov considers interpretative declarations to be reservations is not clear. On the one hand he cites Rousseau (1944) and Podestá Costa and counts those statements which give a *specific content* (opredelennii smysl) to treaty provisions (pp. 15–20). On the other hand he speaks about statements which give a *different content* (osobii smysl) to provisions (p. 15). Göttling interprets Filippov in the sense that interpretative declarations are not to be referred to as reservations (p.31) because according to him the central idea in Filippov's definition is that a reservation introduces a new legal system. An interpretation does not introduce a new and different norm system. Schweisfurth (p. 249) stresses that he classifies interpretative declarations as "unechte Vorbehalte"; *Juridicheskii slovar* 1956, p. 33; E. Glaser, pp. 42–44. When Soviet writers resort to the vague formulation that a reservation is, i.e., present when a state tries to free itself from an obligation by means of interpretation, such declaration could only be a proper reservation when it clearly goes against an authoritatively established interpretation.
4. They thus recognized that the evaluation of the nature of the statement has to be made independently from the possible designation used by the declaring state. Accioly (*Tratado de direito internacional* 1956, p. 591) contends that this character of the statement depends on how specific the formulation is.
5. v. Crayen, p. 10; Kappeler, *Réserves*, p. 13; Scheidtmann, p. 35, Gubin, *Sovetskii*, p. 129; Kozhevnikov, MP 1964, p. 342; Bastid, p. 76.
6. Pomme de Mirimonde, *Traité des imparfaits*, p. 86.
7. Owen, pp. 1102–1104.
8. Khadjenouri, pp. 21–24.
9. *Ibid.*, pp. 21–24.
10. Harvard Draft, pp. 860–861.
11. *Ibid.*, p. 849.
12. *Ibid.*, p. 849.
13. ALI Tentative Draft (1959) § 111, defined at 57, Gormley, *Influence*, p. 132.
14. ALI Official Draft § 127.
15. ALI Restatement 1965, p. 391 § 127.
16. *Ibid.*, pp. 391–392.
17. Hackworth, pp. 137–138, 148.
18. *Ibid.*, pp. 146–147.
19. ILCYB 1950:II, p. 238; ILCYB 1953:II, pp. 91–124.
20. ILCYB 1956:II, p. 110 (art. 13) and p. 126; ILCYB 1962:II, pp. 31–32.
21. ILCYB 1962:II, p. 31 (art. 1(1)); ILCYB 1966:II, p. 160.
22. ILCYB 1951:I, pp. 171–172(102:44).
23. ILCYB 1951:I, p. 150(101:7) and p. 185(103:130).
24. ILCYB 1962:I, p. 151(652:64).

25. UN Doc. A/5209, ILCYB 1962:II, p. 163.
26. ILCYB 1965:II, pp. 46–47.
27. *Ibid.*, p. 47.
28. *Ibid.*, p. 49.
29. ILCYB 1965:I, p. 153(797:60).
30. ILCYB 1965:I, p. 153(797:60).
31. *Ibid.*, p. 166(799:23).
32. *Ibid.*, see also p. 151(797:37).
33. *Ibid.*, p. 166(799:24–26).
34. *Ibid.*, p. 166(799:27).
35. *Ibid.*, p. 165(799:14).
36. ILCYB 1962:II, pp. 31–32.
37. ILCYB 1965:I, p. 162(798:76).
38. *Ibid.*, p. 166(799:30).
39. Vienna Conference, Documents, p. 10.
40. A/CONF.39/C.1/L.23; Vienna Conference, 1st Session, Nachabe p. 24(CWh 5:5), Maresca p. 20(CWh 5:22), Fattal p. 27(CWh 4:3), Bindschedler p. 28(CWh 5:54), Koutikov p. 28(CWh 5:59), Ruda p. 29(CWh 5:69), Khlestov p. 30(CWh 5:96) and Jamsran p. 32(CWh 6:2).
41. *Ibid.*, p. 33(CWh 6:17).
42. *Ibid.*, Harry p. 29(CWh 5:81), Vallat p. 30(CWh 5:95), Hayes p. 33(CWh 6:18), Bevans p. 31(CWh 5:116) and Blix p. 30(CWh 5:102). See also the view of Sepulveda Amor (Mexico) p. 113(CWh 21:62).
43. ALI Restatement (1962) 1965 § 124(c), ALI Tentative Draft No. 1 1980, p. 122; US Department of State, Revised Circular 175 Procedure (Foreign Affairs Manual, Vol. 11 chapter 700) para. 746.1, Digest of US Practice 1974, pp. 169–215 at p. 213; Memorandum of the Department of State to the Senate Committee on the Judiciary regarding reservations, understandings and agreed statements of interpretation in connection with bilateral treaties. Digest of US Practice 1977, p. 376; Holloway, Modern, p. 485f. An ‘understanding’ is “... expressing the meaning which a party attaches to language used in the treaty” (Park, p. 330). National decision-making organs may be affected by the choice between a reservation and a simple understanding (Park, p. 348). About the difficulties to determine the differences between ‘declarations’ and ‘understandings’ see Whiteman, p. 192. Hearings of the Senate Committee on Foreign Relations. US Senate 87th Congress 1st Session. Convention on OECD, Hearings on Executive E February 14–15, 87–1 March 1 and 6, 1961 pp. 234–237. It was not possible to tell the difference between ‘declaration’ and ‘understanding’. Finally the expressions “‘interpretation’” and “‘explanation of intent’” were chosen.
44. Vienna Conference, 1st Session, p. 34(CWh 6:29). See the *Anglo-French Continental Shelf* arbitration. The French statement concerned the application of the “‘special circumstances’” criterion.
45. *Ibid.*, p. 35(CWh 6:44).
46. The definition from 1944 is reiterated in his general treatise *Droit international public*, Tome I from 1970 on p. 119. For his comments on interpretative declarations see p. 120.
47. Verdross & Simma, p. 375.
48. Imbert, Réserves, p. 16.
49. *Ibid.*, p. 18.
50. Sinclair VC I, p. 44. See his view on ‘simple’ and ‘qualified’ interpretative declarations as developed in VC II, pp. 52–53. See also La Guardia & Delpech, p. 250; Monroy Cabra, p. 58.
51. Vienna Conference, 1st Session, p. 137(CWh 25:35).
52. Elias, p. 35.
53. O’Connell I, p. 239.
54. *Ibid.*, p. 239. Similarly Müller, pp. 21–22.
55. Tomuschat, pp. 464–465. Similarly Nisot, p. 201 n.4.
56. *Ibid.*, p. 465.

NOTES TO CHAPTER 25

1. See *infra* p. 33.
2. Owen, p. 1102.
3. Aarnio, p. 20.
4. For example the declarations of a state whereby it expresses doubts as to the appropriateness of a certain norm, may have the indirect legal effects of giving rise to a series of events which finally leads to the abolition of the norm and its replacement by a new one. Thus the criticism of the Soviet Union with respect to the procedure of the UN Secretary-General applying the unanimity rule to the reservations presented to the Genocide Convention had the indirect legal effect of leading to the adoption of the flexible Pan-American regime.
5. Tammelo, p. 4; De Visscher 1963, p. 6. McNair criticizes the classical saying “*interpretatio cessat in claris*” (LoT, p. 372). See also Bos, Theory, p. 149. On the difficulties in establishing the ‘ordinary meaning’ see Merrills, pp. 58–62.
6. McRae (Legal Effect, pp. 161, 172) calls the declaratory statement a “mere interpretative declaration” and the constitutive statement a “qualified interpretative declaration”. See *supra* ch. 27.1.
7. v. Crayen, p. 10; Kappeler, Réserves, p. 13; Gubin, Sovetskii, p. 128; Kozhevnikov, MP 1964, p. 342. See Göttling’s comment on the vague use of “*uslovie*” in Soviet legal doctrine (p. 44).
8. Tomuschat, pp. 464–465.
9. McRae, Legal Effect, p. 161. The determination of that part of the French statement regarding the special-circumstances requirement of either a reservation or a simple interpretation would not have affected the bindingness of the statement. A reservation formally objected to and a unilateral interpretation whether protested against or not remain inopposable. See Voicu, p. 183.
10. Bernhardt, p. 44–45; Cavaré, tome I, p. 153; Degan, pp. 18–21; Voicu, p. 189ff.; Rousseau, DIP 1970, p. 242f.
11. Tomuschat, pp. 465.
12. See however for the vague declarations by Switzerland in connection with the ratification of the European Convention on Human Rights, *infra* chs. 27.1 and 27.2.
13. Tomuschat, p. 464.
14. A statement by which a state reserves its position with respect to the statement by another contracting party is not an objection. It has been termed a “reserve”, Pleadings, p. 382, Statement by Shawcross. It would be equal to E. Glaser’s “*rezerva la rezerva*” (pp. 63–66). See Netherland’s reaction to the Venezuelan statement to the Continental Shelf Convention.
15. The decision will remind the other states that the statement actually derogates from the provisions of the treaty and that silence would according to the rules on reservations lead to its tacit acceptance.
16. Treaty provisions as well as reservations are often imprecisely formulated and create in themselves uncertainty as to the applicable norms. This is a fact that states have to live with. Szafarz (Zastrzeżenia, p. 57) states that reasons of certainty and safety in treaty relations require the presumption for reservation (and that the rules on tacit acceptance is to be applied to declarations). In Reservations (p. 298) she invokes treaty practice without describing it.
17. This was the issue in the *Temeltasch* case to be discussed later. See ch. 27.1. Sinclair VC II, p. 53.
18. MT 1985 p. 705.
19. MT 1985 p. 695.
20. Sur, pp. 186–187.
21. Imbert calls them “precautionary reservations” (Temeltasch, p. 566). He apparently supposes that the rules on reservations will apply from the moment they are communicated.
22. The Netherlands presented similarly formulated statements to the Covenant on Economical, Cultural and Social Rights. See chapter 26.1.F. MT 1985 p. 120.
23. MT 1985 pp. 564–565.
24. See *infra* ch. 26.1.I.

25. Vienna Conference, 1st Session, Haraszti p. 23(CWh 4:24).
26. See *infra* ch. 26.1.M. MT 1985 pp. 694–696.
27. In the latter case the period for contracting out is 90 days.
28. Degan, p. 16.
29. On the relation between estoppel and acquiescence see Bowett, Estoppel, pp. 197–201. The rule of estoppel "... operates so as to preclude a party from denying before a tribunal the truth of a statement of fact made previously by that party to another, whereby that other has acted to his detriment or the party making the statement secured some benefit" (p. 176). Estoppel may result from positive acts or statements (treaties, declarations, understandings in writing), inaction or failure to act may result in a waiver of rights. As a rule more is required to prove acquiescence.
30. ICJ Reports 1951, p. 138.
31. Imbert, Temeltasch, p. 58; Amend, p. 28; Kühner, Vorbehalte, p. 63; McRae, Legal Effect, pp. 155, 160.
32. Thus the reasoning of the tribunal in the *Anglo-French Continental Shelf* arbitration and of the European Commission in the *Temeltasch* case was based on the assumption that there was a basic difference between these two kinds of statements.
33. Vienna Conference, 1st Session, p. 137(CWh 25:53).
34. This is actually the very basis of any disagreement as to correct interpretation.
35. There was uncertainty as to the nature of a Turkish statement made to four European conventions. Turkey and the other confronted European states were not able to agree on its nature. See *infra* ch. 28.3.3.
36. Turkey did on signing the 1951 Refugees Convention declare that:

"The Turkish government will, at the time of ratification, enter reservations which it could make under article 42 of the Convention."

The Turkish statement has more the character of a communication of its wish to formulate reservations authorized by the convention at the moment of ratification without specifying them. Turkey hardly considered this statement as being in itself a reservation. The reservation had not been confirmed at the moment Greece presented its "objection". The general view was already at this moment that reservations on signature had to be confirmed at the moment of final consent. The formal disapproval of Greece has been registered as an objection and had the following wording:

"The Royal Hellenic Government does not accept and does not consider as valid, as far as Greece is concerned, the second paragraph of the *reservation* made by the Government of Turkey at the time of signature of the present Convention." (emphasis added)

Greece withdrew its "objection" in a communication received by the UN Secretary-General on 19 April 1978 (MT 1985 p. 181 n.12).

37. It has to be underlined that the term 'consensus' in decision-making of international organizations has come to have a meaning that does not require as much as the 'concordance of wills'. See Cassan, pp. 456–485. About the different content of 'consent' and 'consensus' see d'Amato, Consensus, pp. 110, 121.
38. See *supra* ch. 7.3.
39. It seems courts tend to give primacy to the opinion of the declaring states. Boyle, p. 504.
40. Szafarz (Zastrzeżenia, p. 57; Reservations, pp. 297–298) mentions that reasons of "certainty and safety of legal relations" require that a passive state may not refer to its belief that the statement was not a reservation as justifying its inaction and avoiding to be bound by this inaction. Even if all the other states considered the statement not to be a reservation and not to fall under the rule of tacit acceptance, this would not help. Szafarz' view goes against the notion of sovereign equality of states much cherished among socialist states.
41. See *infra* chs. 25.5.2.2.a. and b.
42. Degan, pp. 18–19.
43. Peczenik, p. 73.
44. Pilloud II, p. 116; Pilloud I, p. 413f.
45. If understanding in accordance with plain meaning there is not a reservation. Brandon, p. 433.
46. Heck, p. 52.

47. For a description of natural resources relating to the continental shelf see UN Doc. A/CONF.13/3. United Nations Conference on the Law of the Sea 1958, Vol. 1, Preparatory Documents.
48. MT 1985 p. 695.
49. Hospers, p. 14. Hospers states that the words are not in themselves ambiguous but that they are used ambiguously. On closer analysis the different senses of one word may be related to each other and this may become clear when looking into the etymological history of the word. Where this is not the case there is a 'linguistic accident'. Jareborg, Begrepp, p. 108.
50. Friedmann, p. 251.
51. See supra pp. 63–65.
52. Rousseau, DIP 1970, Tome I, p. 283.
53. Revised Draft of 1965, ILCYB 1965:II, pp. 45–46 art. 19(2), p. 50.
54. Vienna Convention, Documents, p. 27; Ruda, Reservations, p. 186. The change was effected by the Drafting Committee between the 813th and 816th meetings of the ILC; compare with draft at p. 265(813:30 and 816:43). A proposal for the replacement of "and" by "or" is to be found in the statement by Tunkin, p. 266(813:39).
55. ILCYB 1966:II, p. 179; Imbert, Réserves, p. 112; Egidio, pp. 13 and 19. The criterion of the limited participation was not sufficient and had to be qualified by the intention of the negotiating states to reserve participation only to certain states.
56. Pilloud II, p. 174. For the reservation of the Provisional Revolutionary Government of South Viet Nam see Pilloud II, p. 178.
57. Such reservations were formulated by Albania, Byelorussia, Bulgaria, Czechoslovakia, Hungary, Poland, Romania, Ukraine and the Soviet Union, the People's Republic of China, GDR, the Democratic Republic of Viet Nam and the People's Democratic Republic of Korea.
58. Pilloud II, p. 175ff. Scott, pp. 408–415.
59. The example concerns the interpretation of a reservation but the problem is naturally the same for interpreting a treaty. It is essential to find out the intention of the declaring state at the moment it formulated the statement. See ch. 27.1. The statement of Viet Nam was undoubtedly a reservation, but it was not clear if it stood for a wider derogation than the reservations by the other socialist states. Meyrowitz (Conflit vietnamien, p. 197) considers that a disjunctive reading makes the reservation incompatible. The effect of such a reservation is according to the Harvard article in Falk (p. 413) to debar any treaty relations between North Viet Nam and the US. Thus the conjunctive reading was to be preferred.
60. PCIJ Series A No. 6, p. 14.
61. See 4 ILM 1965, p. 974ff. *Italy-US Air Transport* arbitration. Advisory Opinion of the Tribunal given at Geneva 17 July 1965.
62. ICJ Reports 1952, p. 103.
63. Hart CL, p. 125.
64. The drafters may well have been aware of the wish of member states to withdraw from the organization but they may have thought it unnecessary to insert a special provision on this into the convention.
65. Resolution approved on 14 June 1948, Public Law 643, 80th Congress; 4 Bevans 116; MT 1985 p. 295 n.5. Szafarz (Reservations, p. 296) does not consider it in a stricter sense to be a reservation.
66. Whiteman (p. 190) believes this to be an understanding short of a reservation.
67. In 1956 it was stated that: "The construction of permanent installations for that purpose in sea areas where the depth exceeds 200 metres is at present impossible, and is likely to remain so for some considerable time." UN Doc. A/CN.4/97 (ILCYB 1956:II, p. 7). Evensen, p. 15; Johnson, p. 159. In 1958 when it appeared possible to explore depths exceeding 200 m certain states, like Sweden and the Netherlands proposed an outer limit of the 550m-isobath (A/CONF.13/C.4/L.33 and L.19 Rev. 1).
68. 'Unlimited' in the meaning that it would extend over the ocean floor until it meets the outer limit of the continental shelf of another state.
69. It may though be considered beyond doubt that no unlimited extension was thought of by any of the delegates.
70. MT 1985 p. 695.
71. Brownlie, p. 227; Evensen, p. 16. For the preponderance of the adjacency criterion see the *North Sea Continental Shelf* case, ICJ Reports 1969, p. 30 para. 41. Johnson propagated in 1972 for the fix criterion of the 550m-isobath after having analyzed the vague exploitability and adjacency criteria (pp. 168–169). For a discussion in the US on the concept of continental shelf

- see Finlay, Luke W., *The Outer Limit of the Continental Shelf*, 64 AJIL 1970, pp. 62–61; Louis Henkin's reply pp. 62–72.
72. Jareborg, Begrepp, p. 103.
 73. Waismann, p. 119.
 74. *Ibid.*, p. 120.
 75. Chaumont (p. 479) speaks of "lacune" or "carence" when the gap is deliberate. A judge would not be able to fill this gap according to his view against the will of the states. When the gap is not foreseen he would be able to fill the gap by construing what he would reasonably hold to be the states' intentions. "Carence" is according to Siorat not a true gap because here existing rules are replaced by new legal rules or equitable decisions (pp. 113–114).
 76. Frequently negotiating states choose deliberately imprecise formulations, Iklé, pp. 12–25. This happened for instance at UNCLOS III, Mc Dorman, p. 490. The situation is different where the negotiating states have agreed on an interpretation which may have been set forth in an additional protocol or annex.
 77. MT 1985 pp. 733–734.
 78. *Ibid.*, pp. 698–700. Syria itself designated its declaration as an interpretation.
 79. Amendment A/CONF.39/C.1/L.67/Rev.1/Corr.1 sponsored by 19 states was not pressed to a vote. Vienna Conference, Documents, p. 172, para. 454. The Netherlands proposed a Draft Declaration on the Prohibition of the Threat or Use of Economic or Political Coercion in Concluding a Treaty (A/CONF.39/C.1/L.323) which was adopted without changes, p. 173, para. 459.
 80. Art. 79 of the Vienna Convention regulates the procedure for the correction of errors in the text or certified copies. The preamble of the 1934 Convention for the Mutual Protection against Dengue Fever mentions "The President of the Central Executive Council of the USSR" which was faulty and therefore altered by the Soviet statement to read the "Central Executive Council of the USSR" (Filippov, p. 13). Where the treaty is adopted in two or more languages, there may be incongruity between the various texts. The correction of errors is according to the Vienna Convention not to be made unilaterally. Other parties must be able to analyze the texts and make up their minds as to the existence or non-existence of errors and agree on the rectification. The Republic of China asked for the rectification of the Chinese text of the Genocide Convention, which was to take 1½ year of consultations between the UN Secretary-General and the interested states (Oraison, pp. 245–247).
 81. Ross, *On Law*, pp. 111–113 and 134–135.
 82. *Ibid.*, pp. 123–128.
 83. See *supra* ch. 25.5.2.2.b.
 84. Ross, *On Law*, pp. 128–134.
 85. MT 1985 p. 321.
 86. *Ibid.*, p. 321.
 87. MT 1985 p. 103.
 88. The situation is less clear where the inconsistency is present between norms formulated by the same treaty. The case of total-partial inconsistency or exemption does not create any difficulties. In the case of total and partial-partial inconsistency the principle of *lex posterior* will be of no help and a solution to the problem has to be found by using the methods and means of interpretation. However the precedence of one norm over the other leaves the latter 'dormant'. If the former by some chance is abolished the latter will enter into full operation.
 89. See ch. 25.5.2.2.b.
 90. Application of the Geneva Convention, p. 409.
 91. Ross, *On Law*, p. 133ff.
 92. On 4 September 1980 the Iranian government notified the Swiss government as the depositary of the conventions of the change of the emblem. The Swiss government conveyed the decision to the states parties to the conventions on 20 October 1980.
 93. The ICJ Statute makes a distinction between disputes on interpretation and disputes on application. The Vienna Convention makes also a distinction between the question of interpretation (articles 31–33) and the question of application (art. 30 concerning the application of successive treaties relating with the same subject-matter). Statements concerning the relation between norms in separate treaties would preferably be called statements of application. See ch. 13.6. Many writers treat questions of interpretation and application together.

94. The International Law Institute has discussed the question of interpretation in various sessions, Bath Session in 1950, Siena Session in 1952 and Grenada Session in 1956.
95. Elias, p. 72; *Competence of the General Assembly for the Admission of a State to the United Nations* case, ICJ Reports 1950, p. 8; *Polish Postal Services in Danzig*, PCIJ, Series B, No. 11 p. 39; *Interpretation of Peace Treaties*, 2nd phase, ICJ Reports 1950, p. 229.
96. *US Nationals in Morocco* case, ICJ Reports 1952, p. 196.
97. Vienna Conference, Documents, p. 39.
98. *Ibid.*, p. 38 (para. 11).
99. *Ibid.*, p. 39 (para. 8). The order in which the methods are presented is not bindingly hierarchical but practical, chronological.
100. McDougal, Lasswell and Miller, p. 42.
101. PCIJ 1927, Ser. A No. 9, p. 16; PCIJ 1923, Ser. B No. 7, p. 20.
102. ICJ Reports 1948, p. 63.
103. The situation is different where we have a formal agreement as to the correct interpretation in an annex for example.
104. Where a statement simply rejects a certain obligation one does not have to bother about the fact the provision leaves doubts as to the contents of the obligation. The situation is though different if there are some doubts if the provision expresses a duty or only a recommendation.
105. Art. 57.
106. For the text of the 1982 LOS Convention see 21 ILM 1982, p. 1291ff.
107. MT 1985 p. 711.
108. *Ibid.*, p. 117.
109. *Ibid.*, p. 479; see ch. 26.1.E. For a discussion on the contents of the principle of self-determination see Šuković, pp. 341–358.
110. If the rule on tacit acceptance is but a rule of presumption this fact may be invoked to reverse this presumption.
111. Hearing before the Committee on Foreign Relations, United States Senate, 95th Congress, 2nd Session on Ex.1., The Additional Protocol I to the Treaty for Prohibition of Nuclear Weapons in Latin America, August 1, 1958.
112. *Loc.cit.*, p. 47.
113. See p. 263.
114. Art. 69 and art. 63(2).
115. 21 ILM 1982 p. 1329.
116. UN Doc. A/14235, Annex II.
117. Vienna Convention art. 2(1)(a).
118. See *infra* ch. 26.1.H. for all parts of the statement.
119. MT 1985 p. 503.
120. UN Doc. A/4235, p. 5 (UNGAOR 14th Session 1959, Agenda item 65, p. 3). With respect to the US statement to the WHO Constitution it was the World Health Assembly that took the decision on the nature of the admissibility of the statement.
121. UN Doc. A/4235 Annex II.
122. *Ibid.*, Annex IV.
123. *Ibid.*, Annex III.
124. UN Doc. A/4311 para. 6.
125. *Ibid.*, p. 494 notes 11 and 12.
126. See however the Cambodian and the Indonesian reactions *infra* ch. 26.1.H.
127. MT 1985 pp. 502, 504, 504–505.
128. MT 1985 p. 517 n.7 and p. 518 n.9.
129. MT 1985 p. 518 n.9.
130. MT 1985 p. 518 n.11 and n.12.
131. MT 1985 p. 105.
132. See *supra* ch. 2.d.
133. As for example in the 1955 European Convention on Establishment art. 26(2): “Any reservation made under this article shall contain a brief statement of the law concerned.”
134. Standards, section A(6) and D(3–4).
135. Thus for example the action taken by the Secretary-General with respect to the Australian statement on ratifying the Constitution of the UNIDO, MT 1985 pp. 341, 348 n.1.
136. MT 1985 p. 680.

137. 1 Bevens 604.
138. MT 1985 p. 120. See chapter 26.1.E.
139. (Wetboek van Strafrecht voor de kolonie Curacao, 4 October 1915, Publicatie-Blad Anno 1913, No. 67). See also the following case: *Het Eilandsgebied Aruba tegen Verbond van Leerkracht Aruba(VLA)*, Gerecht in Eerste Aanleg-Aruba, 4 mei 1970 (the striking of teachers in public schools), 6 Justicia 1970, pp. 33–36, at 35;
140. See following cases:
 - a) *Het Eilandsgebied Aruba tegen Algemeene Nederlands Antilliaanse Ambtenarenbond (ANAAB-Aruba)*, Gerecht in Eerste Aanleg-Aruba, 19 juli 1972 (striking by civil servants due to the unwillingness of the Aruban administration to fulfill promised financial commitments (belangrijk financieel voordeel). The court of first instance stated that although the striking by civil servants was in principle prohibited it could be justified in certain situations as ultimum remedium. Without passing on the question if such justification was at hand in the present case, the court held that the cooling-off period of 30 days should also apply in the present case, before any strike should be undertaken), 8 Justicia 1972, pp. 50–52 at p. 51;
 - b) *Antilles Chemical Company tegen ANAAB-Aruba*, Gerecht in Eerste Aanleg-Aruba 18 juli 1972 (Civil Servants at the Public Water and Energy Authority) in 8 Justicia 1972, p. 49;
 - c) *Het Eilandsgebied Aruba tegen Juan A. Croes*, Gerecht in Eerste Aanleg-Aruba 26 januari 1981 (teachers at public technical schools), 9 Justicia 1981, pp. 56–58 at p. 57.

As to a critical view on the role of courts on settling labour conflicts by so called “kort geding” or summary decisions see H. TH. Lopez: “Misbruik van het kort geding instrument?” 8 Justicia 1972, pp. 46–48.
141. See infra ch. 27.4.
142. UN Doc. A/4188 p. 3.
143. MT 1985 p. 680.
144. MT 1985 p. 681.
145. Elias, p. 35.
146. See infra ch. 26.1.M.
147. Ibid.
148. 3 Bevens 22, MT 1985 p. 215.
149. Owen, p. 1105. For the text of the Soviet formal reaction see also Raschhofer, pp. 240–241.
150. Ibid., pp. 1106–1107.
151. Brown (Renunciation) pp. 374–378 and (Interpretation) pp. 819–824; Hackworth, p. 146ff.; Mandelstam, pp. 210 and 212; E. Glaser, pp. 44–45. See however Durdenevskii, Soglasie p. 100 (Göttling, p. 27). Durdenevskii speaks also about reservations of a general kind, of which the present statements are an example, making the treaty a dead letter (K voprosu p. 100). Bracht, Grundzüge, p. 100.
152. This was the view of Kellogg (see Hackworth, p. 145) Chamberlain (Mandelstam, p. 229), Briand (Mandelstam, p. 210), Mackenzie King (Mandelstam, p. 236). The majority of the parliaments shared this view, although the representatives of the opposition believed the statements to amount to derogations from the obligations under the pact. Thus for example Lloyd George and Woodsworth (Mandelstam, pp. 231 and 237).
153. Mandelstam, p. 255.
154. Even if applying the flexible rule an objection would have the effect of making the functioning of the pact illusory.
155. It has been considered that a later acceding state would not be able to object to reservations unanimously accepted at an earlier date.
156. Bishop, p. 307.
157. Ibid., pp. 309–312.
158. Ibid., pp. 310–311.
159. UN Doc. 5687, ILCYB 1965:II, p. 85.
160. See ch. 25.8.2.
161. The IMCO Constitution did not contain any reservation clause. It is an open question if parts or the whole of this provision is exempted from application.
162. Such as the various concepts in the 1958 Continental Shelf Convention and the 1982 Law of the Sea Convention.
163. The statement of Indonesia was disapproved of by Australia, Denmark, Fiji, FRG, Japan, Madagascar, the Netherlands, Thailand, Tonga, the UK and the USA. The statement of

Canada was disapproved of by the US, the statement of France was reacted upon by Canada, Spain, Thailand and the UK, the statement of the FRG by Canada and the US.

164. For the texts of the French statement and the Soviet reaction see SIPRI Yearbook 1985 p. 520 n.7 and n.11. See also Senate Foreign Relations Committee, Hearing 22 September 1981, p. 6. The Department of State Legal Adviser's Office presented a legal and historical analysis which was to convince the Committee that the transit and transport of nuclear weapons through the zone is in no way affected by the treaty or its protocols. The 1978 Soviet statement was held to be a "political statement of opposition to such transit and as such has no validity or effect".

NOTES TO CHAPTER 26

1. PCIJ 1927, Ser. A No. 9, p. 28.
2. O'Connell Vol I, p. 17.
3. ICJ Reports 1951, pp. 138–139.
4. *Ibid.*, p. 139.
5. Designated by the Secretary-General as a reservation. MT 1985 p. 56. Venezuela again made “formal reservations” to article 38. MT 1985 pp. 56–57.
6. See *supra* 22.10.
7. Australia, Belgium, Canada, Denmark, France, New Zealand and the UK. Szafarz considers this to be an ambiguous statement (*Zastrzeżenia*, p. 55).
8. The UK reacted already in 1950 to the statements made by various states. The Philippines' statement was already disapproved of in a letter from the UK delegation to the UN dated 30 September 1950 (*Pleadings*, pp. 173–174).
9. For discussion on the Philippines statement see Díez de Velasco, E1 sexto, pp. 1051–1052.
10. Brazil's reaction is more a way of reserving its position than a formal objection.
11. The Finnish Constitution Act of 1919, § 47(2).
12. MT 1985 p. 114 n.11.
13. The Indian statement was designated as a “declaration” by the Secretary-General, MT 1985 p. 119.
14. See Šuković, p. 345.
15. The designation “reservation” was used by the Secretary-General, MT 1985 p. 120.
16. *Ibid.*
17. See *infra* ch. 27.2.
18. See ch. 25.8.2. ns.1186a and 1186b.
19. This is for example the case in Finland and Sweden.
20. Triggs (pp. 291–295) considers reservation to art. 14(3)(d) not to be incompatible (p. 297). He however contends that the declaration on convicted persons “... comes closest to derogating from the object and purpose of the Covenant, particularly in relation to article 14.” (p. 300). The general declaration on convicted persons has now been withdrawn. MT 1985 pp. 144–145 n.4.
21. See Finnish Government Bill (42/1974, p. 5) on the ratification of the Covenant. Statute 87/73 on legal assistance does not provide for free legal assistance during preliminary investigation.
22. On the reasons for the late ratification of France see Imbert (*La France*, pp. 32–40). One of the reasons was a certain reluctance to provide for a right of petition.
23. Not all states where there are such limitations have referred to them in an express statement.
24. See *supra* ch. 9.1.
25. See *supra* ch. 25.8.2.
26. Objections were also made by Norway, Sweden and Pakistan.
27. MT 1985 p. 567.
28. See Corriente Córdoba, p. 163.
29. Guatemala has a new Constitution from 1973. The reference to art. 16 is therefore misleading. Art. 16 of the Guatemalan Constitution of 2 February 1956 states: “Son ciudadanos 2) Los mujeres guatemaltecas mayores de dieziocho años que sepan leer y escribir”.
30. All the material rules are covered by articles I to III. For the question of the limited effects of objections see *infra* ch. 27.3.
31. It is not certain how far the second part of the Guatemalan statement rejects the competence of the ICJ. Reference is made to art. 149(3)(b) of the 1956 Constitution which reads: “Aprobar con el voto de los dos terceras partes del total de Diputados que integran el Congreso: ... b) los compromisos para someter cualquier asunto a decisión judicial o arbitraje internacional”.
32. Kungl. Maj:ts proposition Nr. 48:1954, p. 4.
33. Proposition 1979/80:147, pp. 5–6 (Swedish Government Bill 1979/80:147).
34. *Ibid.*, pp. 5–6.

35. See UN Coffee Conference, New York 9 July – 25 August 1962 and 28 September 1962. To the 1968 International Coffee Agreement, Belgium, Finland, Denmark, FRG, Japan, the Netherlands, Norway, Sweden, Switzerland and the UK provided statements protesting against discriminatory shipping practices by certain of the coffee exporting countries relating to the international transport of coffee (MT 1985 p. 600). These are only declarations of principle, the Coffee Agreements do not regulate this question. See also the Swedish Government Bill No. 27 from 1983 (Kungl. Maj:ts proposition Nr. 27 år 1963, p. 16).
36. Code of Navigation, Approved by Royal Decree No. 327, 30 March 1942, art. 2(2), amendment by Law No. 359 of 14 August 1974.
37. Customs Law No. 1424 of 25 September 1940, art. 33, UN Legislative Series: Laws and Regulations of the Regime of High Seas, NY 1951, ST/LEG/SER. D/1, p. 82.
38. The new Law of the Sea Convention however provides for the extension of the customs zone to 24 n.m. from the baselines, art. 33(2).
39. The statements are not clear as to their actual content, because they don't tell which other acts they require to be covered by the definition. Art. 101 of the 1982 Convention is identical with the definition of the 1958 Convention.
40. All parties may admit a certain reservation even if prohibited by the treaty. This may be construed as supplementary agreement providing for an exception to the norms of the convention. Art. 40 of the Vienna Convention on the amendment of multilateral treaties states that all the "contracting states" shall have the right to be notified of such intentions and the right to take part in such a procedure. This would leave states having only signed the treaty without a say in the matter. Modifications of the treaty may be agreed upon by only some of the parties under the conditions set forth in art. 41 of the Vienna Convention. These procedures concern the case of amending and modifying the treaty text. Admitting exceptions without affecting the treaty text would naturally be possible under the same forms.
41. UNCLOS 1958, Official Documents, Vol. II, p. 69 (CWh 24:15).
42. See infra ch. 27.1.
43. ICJ Reports 1951, p. 138.
44. See infra ch. 27.3.
45. Albania acceded on 7 December 1964 to the Convention.
46. Art. 309 prohibits reservations as exceptions to the Convention unless expressly permitted by the other articles of the Convention. By exceptions one means optional exceptions to the Convention disputes settlement procedures under art. 298. Oxman, UNCLOS III, 9th Session, p. 248 n.17.
47. MT 1985 pp. 717–718.
48. It must prove that it was manifest that the acting organ had acted *ultra vires*. See Vienna Convention art. 27 and art. 46.
49. See Finnish Government Bill No. 87:1976, p. 2 (Hallituksen esitys Eduskunnalle valtiosopimusoikeutta koskevan Wienin yleissopimuksen eräiden määräysten hyväksymisestä).
50. Thus for example the opinion of the Japanese delegate Fujisaki. Vienna Conference, 1st Session, p. 272 (CWh 48:47).
51. The final formulation was the result of an amendment proposed by 14 states (A/CONF.39/C.1/L.289 and Add.1). Many Western states voted against or abstained from voting on the amendment. Vienna Conference, Documents p. 173, Reports of the Committee of the Whole, para. 455.
52. Ibid., para. 459.
53. See supra p. 220.

NOTES TO CHAPTER 27

1. See however the comment by the UK government in the *Anglo-French Continental Shelf* arbitration, p. 34. This is however a single view which apparently has not been expressed on other occasions.
2. Imbert (Décision, pp. 35–37) considers that the material criterion should be given prevalence above the subjective.
3. Eur.Court H.R.; The *Temeltasch* case. Decision of 12 October 1981 *Temeltasch v/Switzerland*.
4. *Ibid.*, p. 23f. For the debate on the conditions for the Swiss ratification see Charles Rousseau, *Chronique des faits internationaux*, RGDIP 1969, pp. 493–495.
5. *Temeltasch* case, Decisions and Reports No. 26, June 1982, p. 51 para.92.
6. *Ibid.*, p. 147, para. 75.
7. *Ibid.*, p. 148, para. 80. The Swiss Federal Justice Office and the Federal Court seemed assured that the Swiss Parliament conceived the statement as a clear condition. Malinverni & Wildhaber (1981 pp. 287–288). Brändle (pp. 45–46, 93, 113–117) considered it also to be a reservation and as it was not formulated in accordance with art. 64 it was invalid.
8. The same preparatory work, i.e., the statements before the Federal Council which according to the Swiss government (*Temeltasch* case, p. 12: Submission of the Swiss government), were stated to establish the nature of the Swiss “interpretative declaration” as a reservation was understood by others to be simply an effort not to prejudge the interpretation of art. 6(3)(c) (Imbert, *Temeltasch*, pp. 562–566). Malinverni & Wildhaber did not find it correct to formulate a reservation before 1978 when the *Temeltasch* decision was passed (1981, p. 288).
9. Another example which shows that one cannot rely too much on the views of the declarant as to the very nature of the conditional character of a statement is provided by the US reservation to its acceptance of the compulsory jurisdiction of the ICJ. Perrin, p. 170.
10. Eur.Court H.R., the case of *Luedicke, Belkacem and Koc*, Judgement of 28 November 1978, Series A No. 29.
11. Imbert, *Temeltasch*, pp. 573–574, n.46.
12. Eur.Court H.R., *Öztürk* case, Judgement of 21 February 1984, Series A 73, p. 20. A person charged with a criminal defence who has had the assistance of an interpreter during the criminal proceedings and a legal assistant in court and who had the verdict orally translated is not considered to have the right to require that the sentence be translated into his own language. He cannot claim a violation of article 6(3)(e) in the European Human Rights Convention. A right to have the sentence translated in writing cannot be deduced from the right under article 6(3)(e) of the ECHR to have the assistance of a free interpreter (Beschluss des Zweiten Senats vom 17 Mai 1983– 2BvR 731/80– Entscheidungen des Bundesverfassungsgerichts 64/1984).
13. *Anglo-French Continental Shelf* arbitration, p. 39 para. 54.
14. *Ibid.*, p. 40 para 55. McRae agrees with the tribunal that the statement is in substance not a reservation, but becomes such due to the subjective criterion of conditionality (Delimitation, p. 178).
15. *Loc.cit.*
16. Anyway there is no reference to it in the French written submissions.
17. The French statement to the 1967 Tlatelolco Treaty is similarly formulated in categorical terms. As art. 27 of the treaty forbids reservations the French statement would be construed as an interpretative statement. This shows that the actual wording of a statement as such is not very reliable when determining the nature of a statement.
18. Treaty practice of states shows that the term “objection” has been often used to designate statements that actually have not been formal objections according to the Vienna Convention.
19. They were however at the very heart of the dispute.
20. *Anglo-French Continental Shelf* arbitration pp. 38–39, paras 51–52.
21. *Ibid.*, p. 46 para. 71.
22. *Ibid.*, pp. 46–47, para. 72–73.

23. *Ibid.*, p. 53, para. 87.
24. The question is how independent the tribunal may be with respect to the evidence presented by the litigants. Shall the views of the declaring state be given precedence over the views of the confronted state as to the nature of the formers statement?
25. This is also the opinion of Imbert (*Décision*, pp. 34–37).
26. Quenedec, p. 81.
27. This was not an issue in the *Temeltasch* case, p. 144 para. 60.
28. The French government did actually not specify why the terms of its statement were so clear.
29. See ICJ Report 1969, pp. 48–53, para. 88–101.
30. *Anglo-French Continental Shelf* arbitration p. 43 para. 64.
31. See ch. 23.3.
32. See *infra* ch. 26.1.G. Marcus-Helmons (p. 15) describes the background of art. 64. The purpose was to eliminate reservations of a general character. Reservations which in general terms declare that a convention will apply to the declaring state only in so far as it does not contravene the constitution or the laws of the state has actually the effect of making participation nominal as no new obligations are entered into. They would only be thinkable with respect to a certain provision. Such a statement would otherwise be incompatible. See statement of Lawyer's Committee, Hearings 1979 p. 48.
33. *Temeltasch* case, p. 151, para. 91. When art. 64 (1) prohibits general reservations this does not mean that a reservation designating a specific provision is covered by this prohibition. A general declaration invoking national or security interests is according to Marcus-Helmons not permitted (pp. 15–16). Brändle criticizes the *Ringeisen* decision because the Court deliberately avoided to check whether the Austrian reservation was validly formulated according to art. 64 of the European Convention on Human Rights (pp. 104–105). Kopetzki states that the Commission has avoided to decide on the admissibility of a reservation under art. 64. In one case (Appl. 1821–22/63 CCD 19 p. 56) the Commission considered a reservation as not being general as soon as it refers to a certain provision (Kopetzki p. 25). Kopetzki advocates also a strict application of art. 64 (pp 30–31).
34. *Ibid.*, p. 234.
35. The obligation to inform about national legislation that does not conform to treaty obligations covers also subsequent amendments. This may also be felt as an inconvenience. States do often not keep the depositary informed about possible changes in their national laws. There had been proposals to introduce a duty to report periodically which were not accepted (Marcus-Helmons, p. 17; Brändle, pp. 7–14).
36. Szafarz, *Treaty Practice*, p. 251. Reservations of a similar kind are those made to declarations of acceptance of the compulsory jurisdiction of the ICJ. The US reserved "... questions that belong to the national competence as indicated by the US." The application of this reservation was not easy as shown in the *Interhandel* and *Certain Norwegian Loans* cases. Perrin (p. 175) suggests that such imprecise reservations have to be interpreted according to the principle of *contra proferentem*.
37. This statement was opposed by Ferguson, p. 44; Henkin, *The Covenant*, pp. 23–24; Weston, p. 37 and Weissbrodt, p. 48. As to other criticism towards planned reservations and declarations in connection with US ratification of human rights treaties see Rodley, pp. 16–19; Henkin, *The Covenant*, pp. 21–26.; Weston, pp. 29, 30–33. Goldklang (pp. 64–67) and Rovine (pp. 57–61) presented a more favourable view on the statements proposed by the Carter administration.
38. Senator Pell of the US Senate Committee of Foreign Relations declared that silence is not always acquiescence, Hearings 1979, p. 44. Soviet legal doctrine does not accept that silence may be construed as acceptance of unilaterally advanced interpretations (Bracht, *Auslegung*, p. 73).
39. See for example under ch. 26.1.G.
40. The whole question appears to have been treated very superficially for quite a while in international legal doctrine.
41. For the discussions on the question see Vienna Conference, 2nd Session, p. 181(P1M 33:10).
42. An objecting state may well consider that the exception to a certain rule is essential for its acceptance. If this exception is not accepted by another state the objecting state may have no interest whatsoever to consider itself bound by the general rule. Where the exception is expressed in one paragraph and the general rule in the other, both paragraphs would become inapplicable.

43. MT 1985 p. 735.
44. In spite of the fact that it was applied in the Pan-American treaty system. Szafarz tries to prove that practice supports the minimum effect rule (Reservations, p. 307). The proof she gives is too weak. Most objections do not mention the effects they are intended to have. Three of the declarations she discusses were supposed to have maximum effect and seven of them the minimum effect. It would appear that she mixes *de lege lata* with *de lege ferenda* considerations.
45. It is not correct to state that art. 12 provides an answer as this provision simply enumerates the articles of the convention to which reservations were not possible. See Imbert, *Décision*, p. 50.
46. See the submission by the UK government to the Court, *Anglo-French Continental Shelf* arbitration, pp. 10–11.
47. ICJ Reports 1974, p. 350.
48. The important thing is to find out the actual scope of their disagreement in order to determine to what extent the norms under the Continental Shelf Convention were inapplicable. Bowett, *AJIL* 1955, *Pilloud II*, Imbert, *Décision*, p. 37.
49. *Anglo-French Continental Shelf* arbitration, pp. 44–45, para. 68.
50. The Court of Arbitration admitted that the end result was much the same. *Ibid.*, p. 53 para. 87.
51. Quenedec, p. 72.
52. See *supra* ch. 16.1.M.
53. Moore, p. 423.
54. Baxter & Buergenthal, p. 864; Moore, p. 423.
55. It was also proposed that the US should ask for an advisory opinion. Baxter & Buergenthal, p. 877; Moore, pp. 501–502.
56. Moore, pp. 500–501.
57. The US made however a statement of positive reciprocal application. 26 UST 571. The guidelines for the US Department of State concerning the conclusion of treaties. See para 746.1. on 'Understandings and Reservations':

“If it is necessary to inform other governments concerned, and *perhaps* obtain their consent, with respect to an understanding, interpretation, or reservation included by the Senate in its resolution of advice and consent, this Government communicates with the depositary, which then carries on the necessary correspondence with the other governments concerned.” (emphasis added)

See also n. 43 in ch. 24.

58. MT 1985 p. 132.
59. MT 1985 p. 696, Canada “reserves its position” and the Netherlands “reserve all rights”. See *supra* ch. 26.1.M.
60. See ch. 25.2.2.

NOTES TO CHAPTER 28

1. Díez de Velasco, *Naturaleza*, p. 392.
2. Art. 77 of the Vienna Convention. The depositary has to check if the instrument of ratification or other official notifications come from the competent authority. Díez de Velasco, p. 406. Summary of the Practice of the Secretary-General as Depositary of Multilateral Treaties (ST/LEG/7, p. 18). See also the legal opinion on the requirements for a valid withdrawal of a reservation, UNJYB 1974, p. 190.
3. Art. 18 of the Covenant of the League of Nations already obliged the members of the League to register treaties with the League Secretariat. The UN General Assembly passed a resolution in 1977 temporarily deferring the publication of certain categories of treaties: UNGA Res. 32/144, 32 UNGAOR (1977), Suppl. (No. 45) 210. See UN Doc. A/32/214, paras. 29,34 (1977). The intention was to reduce the interval between registration and publication, which in 1977 had reached 5 years on average. Tabory, p. 353.
4. See *supra* ch. 3 n.15.
5. UN Doc. A/1372, p. 3.
6. Summary of the Practice, p. 32 para. 59.
7. Loc.cit.
8. UN Doc. A/1372, p. 5.
9. This uncertainty was admitted by the Secretary-General in his Report A/1372, p. 2. See also Pleadings, pp. 132, 314 and 324, Statement by Kerno.
10. UNGA Resolution 598(VI) adopted on 12 January 1952.
11. The member states were requested to present their views "as soon as possible". Summary of the Practice, p. 36.
12. UN Doc. A/4188, p. 7, 14 UNGAOR (1959), Annexes (65).
13. UNGA Resolution 1452 (XIV) of 7 December 1959. See ILCYB 1963:II, p. 27.
14. UN Doc. A/5687, ILCYB 1965:II, p. 102.
15. This happened for example in the case of the reservations and declarations to the Genocide Convention where the Secretary-General had also informed the UK although it had neither signed nor ratified the convention at that date.
16. Summary of the Practice, pp. 33–34.
17. *Ibid.*, p. 39.
18. 276 UNTS 200–208.
19. Summary of the Practice, p. 40.
20. UNJYB 1976, p. 212.
21. UNJYB 1976, p. 23.
22. UNJYB 1976, p. 213. The origins of the 90-day rule may be traced back to the fact that many conventions stipulate a 90-day delay for making the treaty enter into force after the last required instrument of ratification or accession has been received. In these cases the consultation procedure would not introduce a period of uncertainty as to the actual date of the entry into force of the treaty. The 1953 Convention on the Political Rights of Women stipulates in its reservation clause under art. VII the same period of 90 days for objections.
23. UNJYB 1976, p. 212.
24. This has not occurred. If it were to happen it would create problems. The Secretary-General would not be able to act before referring the whole question to the General Assembly.
25. See Imbert's criticism, *Entrée en vigueur*, p. 351.
26. UNJYB 1976, p. 213.
27. *Ibid.*, p. 213 para 14.
28. *Ibid.*, p. 213 para 15.
29. UN Doc. A/5687, para. 33; Imbert, *Entrée en vigueur*, p. 531.
30. According to art. 34 of the High Seas Convention it shall come into force on the 30th day following the date of deposit of the 22nd instrument of ratification or accession.
31. UNJYB 1975, p. 205.
32. Poland expressed also its disagreement with the participation clause under art. 17(1), MT 1985 p. 108.

33. UNJYB 1964, pp. 266–268.
34. MT 1985 p. 113 n.2.
35. Here we have a treaty where the period for objecting is identical with the period of consultation by the UN Secretary-General.
36. UNJYB 1975, p. 205.
37. MT 1985 p. 123 n.1.
38. Madagascar had objected to the reservations and declarations of Bulgaria, Byelorussia and other socialist states being “inconsistent with the aims and purposes” of the Convention. Israel had also made a general objection against reservations which were incompatible with the purposes and objects of the 1958 Law of the Sea Conventions but the only reservation indicated as incompatible was the one formulated by Tunisia on signature, MT 1985 pp. 688–689.
39. UNJYB 1964, pp. 266–268.
40. *Ibid.*, p. 267.
41. UN Doc. A/5687, paras. 23–25.
42. UNJYB 1964, p. 268 para 10.
43. *Ibid.*, p. 268 para. 11.
44. Bishop, p. 297; Summary of the Practice, pp. 37–38; 33 UNTS 261. UNJYB 1964, p. 268 para. 13.
45. Letter dated 22 October 1963, UNJYB 1963, pp. 188–190.
46. UNJYB 1965, pp. 234–236.
47. Summary of the Practice, pp. 32; MT 1985, p. 295 n.5.
48. Summary of the Practice, p. 33. The Meeting of the Contracting Parties was a type of decision-making organ of the Gatt (see art. XXV of the Agreement).
49. Resolution No. C.1(III) by the IMCO Council was from 1 March 1960. For the communication from the Secretary-General see UNJYB 1969, p. 224.
50. MT 1985 p. 518 n.11.
51. MT 1985 p. 518 n.12.
52. MT 1985 p. 341. Australia declared *inter alia* that UNIDO would be accorded the same privileges and immunities which are accorded by Australia to other specialized agencies.
53. MT 1985 p. 348 n.1. Reservations are not permitted to the UNIDO Convention and the Secretary-General wanted to ascertain that the Australian statement was not intended to be a reservation.
54. UNJYB 1971, p. 224.
55. UNGAOR, 14th Session, Annexes, agenda item 65, UN Doc. A/4311, para. 20.
56. MT 1985 pp. 768–769 n.5.
57. UNJYB 1971, p. 225.
58. MT 1985 p. 769 n.5. UK communication received by the Secretary-General on 12 May 1972.
59. This may have brought up the question of the application of the unanimity principle to the conventions concluded under the auspices of the League of Nations which would have caused a new dispute.
60. In practice then the principle of non-retroactivity cannot be applied to its full extent.
61. The text of the resolution is reprinted in UN Doc. A/CN.4/154, ILCYB 1963:II, p. 28.
62. UN Doc. A/5687, p. 101.
63. Art. 28 of the Convention on Discrimination of Women.
64. The Secretary-General has declared that he will not receive any instrument for deposit which is accompanied by a prohibited reservation, UN Doc. A/5687, p. 101 para. 21. This naturally concerns the case where a reservation is explicitly prohibited by the treaty itself. Now the Convention on Racial Discrimination does not contain any such express prohibition but provides the machinery to declare a reservation inadmissible and prohibited. A reservation is latently inadmissible until there is established a tacit acceptance by at least one third of the parties.
It must be remembered that the Polish reservation was a very common one. Up to the end of 1985, 29 states had formulated reservations to art. 22 on compulsory jurisdiction. Out of these, 15 had also made declarations to articles 17 and 18 concerning participation in the Convention. See Cassese (Sull’entrata, pp. 531–534) who suggests that all states which have ratified or acceded to the Convention before its entry into force would be able to determine the nature of the reservation.
65. The author does not agree with the view of Cassese (see *Una nuova*, p. 622; *A New Reservation*

Clause, p. 296). Articles 20 and 19 of the Racial Discrimination Convention do not provide an answer to the question how instruments of consent subject to reservations affect the entry into force of treaties. As soon as the clause does not give any answer to the question the consultation period of the Secretary-General would become applicable. Once a reservation is declared incompatible or inhibitive it invalidates the instrument of consent only if it is not withdrawn which then would create some difficulties for determining the date of entry into force of the Convention.

Cassese argues that the elaborators of the Racial Discrimination Convention must have been aware of the limited scope nowadays given to the expression 'state parties' meaning only a "state that has consented to the treaty and for which it is now in force". As the logical-grammatical interpretation would lead to absurd results a correcting interpretation would be applicable finding a way out that best would satisfy the assumed intentions of the parties to find a working solution.

66. Cassese solves the vagueness of the expression "state parties" in article 20 through what he calls an "extensive interpretation" (Una clausula, p. 620; Sull'entrata, p. 533). The competence of objecting and accepting reservations belongs to any of the states who has ratified and acceded to the convention. This has the effect that an express acceptance of at least 2/3 of the 27 states may declare the reservation admissible and thus declare the instrument relevant for the entry into force of the treaty. This solution has to cope with the same problems as the method of retroactive announcement of entry into force. The consultation period of 90 days applied by the Secretary-General and the period of 90 days for determining if a reservation is admissible are both exactly to the same extent longer than the delay of 30 days after the last required instrument on consent has been received for determining the date of entry into force. Both solutions cannot do away with the theoretical possibility that a reservation formerly accepted later on encounters the necessary majority for being rejected (Sull'entrata, p. 534).
67. If by any chance the number of parties would fall below the number that was required to keep the treaty in force it would result in the termination of the treaty. The single fact that the number of the parties falls below the number necessary for its entry into force does not in itself terminate the treaty (Vienna Convention art. 55).
68. UNJYB 1976, p. 210; Summary of the Practice, p. 34 para. 64.
69. UNJYB 1975, p. 206, UNJYB 1976, p. 210. Kappeler, Praxis, p. 24.
70. Summary of the Practice, p. 34 para. 21.
71. UN Doc. A/5687 para. 21, ILCYB 1965:II, p. 101.
72. UNJYB 1969, p. 224.
73. MT 1985 p. 518 n.11.
74. UNJYB 1963, p. 189; UNJYB 1965, p. 234.
75. The Swiss Federal Council as depositary notifies all statements to the interested states, but indicates if the statement is to be considered a reservation or a simple declaration. Kappeler, Praxis, p. 24. The US State Department undertakes similarly an evaluation of the character of a statement. See also comment of the Dominican Republic, UN Doc. A/5687 p. 85.
76. UNJYB 1975, p. 204. See Imbert's comment on the drafting history of art. 72 of the Vienna Convention (Imbert, Entré en vigueur, p. 529).
77. This is not the case when the last instrument does not contain any reservation and earlier reservations have not been objected to.
78. Art. 33; UN Doc. A/5687 para. 33, ILCYB 1965:II, p. 103.
79. Ibid., p. 103.
80. Convention on Political Rights of Women, art. VII.
81. UNJYB 1976, p. 212.
82. UNJYB 1975, p. 204 para. 3.
83. UNJYB 1976, pp. 210–211; UNJYB 1977, pp. 234–235; UNJYB 1980, p. 150.
84. ILCYB 1981:II, pp. 121, 137–140.
85. More is required to prove acquiescence in some conduct as obligatory. The difference may also lie in the burden of proof. In the case of tacit acceptance under art. 20(5) of the Vienna Convention the confronted state would have to prove that it did not actually accept the reservation, whereas in the case of acquiescence the burden of proof would lie on the reserving state. The simplest solution would be to have the same rule of tacit acceptance apply to both the question of compatibility and the plain acceptance of objection to an otherwise admitted reservation.
86. Imbert, Entré en vigueur, p. 532f. On one occasion the Secretary-General did follow the

consultation procedure where a signatory state not party to the treaty had objected. This was when Israel protested against certain statements by some Arab countries to the 1966 Covenant on Economic, Cultural and Social Rights. See UNJYB 1975, p. 205.

87. UNJYB 1969, p. 314.

88. MT 1985 p. 348 n.1.

89. There has been some discussion on the bindingness of the General Assembly resolutions from 1952 and 1959. Dehaussy points out that the resolutions are not binding but only recommendatory. The resolutions were not even taken unanimously. He further contends that there are treaties to which states not members of the UN belong. These states cannot, strictly seen, be required to accept the implications of the General Assembly resolutions (Dehaussy, *Dépositaire* p. 520). He classifies the case as an example of proper "législation internationale". Further, it may be of interest to remind the reader of the general discussion on the functions of the depositary. One school (Dehaussy, *Dépositaire*, pp. 322-323, Khadjenouri, p. 73) underlines that the depositary is an organ for the states parties to the treaty, others confer an independent role for the Secretary-General as the depositary, more as an organ for an international organization (Diez de Velasco, p. 399).

90. Abstaining from determining the entry into force when instruments contain reservations would go against the treaty-based obligation to announce the entry into force. See also Pleadings, p. 313. Statement by Kerno. McDorman considers also that the Secretary-General has undertaken acts which are not purely administrative (p. 509).

91. Imbert, *Entré en vigueur*, p. 537. Within the Pan-American system the OAS Secretariat consults the other American states when receiving an instrument of ratification with a reservation. This procedure will postpone the entry into force with one year if the last required instrument is accompanied by a reservation. This will happen in spite of the fact that objections do not bar the reserving state from participating in the treaty. ILCYB 1951:I. Yepes p. 178 (103:16). See *infra* ch. 28.3.1.

92. Imbert, *Entré en vigueur*, p. 537. A more flexible clause on the entry into force of a treaty could according to him be formulated in the following way:

"La présente Convention entrera en vigueur le trentième jour qui suivra la date à laquelle auront pris effet les actes par lesquelles trente-cinq Etats auront exprimé leur consentement à être liés par la Convention conformément aux dispositions des articles X et Y (ratification ou adhésion).

93. It must be remembered that the consultation procedure was introduced at a time when the rules on reservations had not been crystallized. In the beginnings of the 1960ies when the consultation procedure was introduced, reservations were theoretically seen more easily invalidated as the maximum effect was supported by the majority within the ILC.

94. See *supra* pp. 342-343.

95. Imbert, *Entré en vigueur*, p. 527.

96. Israel has not yet (end of 1985) ratified the Covenant on Economic, Social and Cultural Rights.

97. As for the definition of "party" see Vienna Convention art. 2(1)(g). A party is a state which has consented to be bound by the treaty and for which the treaty is in force. A "contracting State" is also a state having consented to the treaty, but for a contracting state the treaty may not yet be in force.

98. IATC A-32, p. 34.

99. IACJ Reports from 1955, pp. 8 and 10; Ruda, *Reservations*, p. 127.

100. *Ibid.*, p. 10.

101. *Ibid.*, p. 11 paras. 24 and 25.

102. See *supra* ch. 20. They were the result of a Venezuelan proposal. *Diario de la 8. Conferencia Internacional Americana*, p. 611.

103. View expressed at the 8th Inter-American Conference by the Peruvian delegate Ulloa, IACJ 1955, pp. 9-10; Ruda, *Reservations*, p. 120.

104. IACJ 1955, p. 32.

105. IATC, A-24, p. 40.

106. *Normas*, p. 4.

107. IATC A-43, pp. 93-99.

108. Inter-American Juridicial Committee, Report on the Juridicial Effect of Reservations to Multilateral Treaties, Pan American Union, Washington D.C. June 1955 (CIJ 23).

109. Ruda, *Reservations*, p. 129.

110. Standards A(7).
111. Ruda, Reservations, p. 131; Ruda, Los efectos, p. 26.
112. For text see OASTS 36.
113. IATC B-32, p. 187.
114. I.A.Court H.R., Advisory Opinion No. OC-2/82 of 24 September 1982, *The Entry into Force of the American Convention* (Arts. 74 and 75) pp. 15–16.
115. *Ibid.*, p. 9 para. 23.
116. Conferencia Especializada Interamericana sobre Derechos Humanos, San José, Costa Rica, 7–22 de noviembre 1969. Actas y Documentos (OEA/Ser.K/XVI/1.2, Washington D.C. 1973) at 13; see also IAYBHR (1973), at p. 389).
117. Last sentence of art. 67(12) of the Draft reads: "... La reserva debe ir acompañada del texto de la norma a que se refiere."
118. I.A.Court H.R. Advisory Opinion No. OC-2/82, p. 11 para. 26.
119. *Ibid.*, p. 14 para. 35.
120. *Ibid.*, pp. 12–14, paras. 28–33.
121. *Ibid.*, p. 14, paras. 32–33.
122. *Ibid.*, p. 15, para. 36.
123. Art. 28(2) condemns such incompatible reservations but does not tell how the incompatibility is going to be ascertained. A dispute about the nature of a reservation is actually a dispute concerning the application of the treaty and would have to be settled by negotiation or arbitration according to art. 29. The exclusion of the obligations under art. 29 is the reservation most commonly resorted to (by 24 states). The incompatibility is then individually determined. The defects in the system of individual determination of incompatibility is not only in the fact that some confronted states may consider the reservation compatible and others as incompatible, but also that states may assign different effects to a reservation they all consider incompatible:
a) The reservation is void ipso facto but the reserving state remains a party to the entire treaty.
b) A larger part of the treaty affected by the reservation will not apply between reserver and objector, the rest applies (see the Syrian and Tunisian reservations to the Vienna Convention) and
c) The incompatible reservation invalidates the instrument of consent and the reserving state remains external to the treaty from the point of view of the objecting state. Imbert does not accept that reciprocity is totally absent (Human Rights, pp. 36–37).
124. I.A.Court H.R., Advisory Opinion No. OC-2/82, p. 14 para. 34.
125. The Inter-American Convention on Human Rights required 11 ratifications. Within the Inter-American treaty system there are to be found treaties which may enter into force upon the deposit of one single instrument of ratification. The 1948 Inter-American Convention on the Granting of Political Rights of Women enters into force for each state on the deposit of its ratification. Vasak underlines the political and mutual nature of the European Convention on Human Rights (Égoïsme, p. 366).
126. Although objections are less frequent to reservations concerning human rights treaties, they do exist and their number may increase. See ch. 29 n.5.
127. I.A.Court H.R., Advisory Opinion No. OC-2/82, p. 15, para. 38. This argument appears to be the basic one for the whole opinion.
128. *The Anglo-French Continental Shelf* arbitration, pp. 32–33.
129. See supra ch. 26.1.M. Reservations to the 1951 Refugees Convention are also authorized in general terms. Objections have been made and registered with the UN Secretary-General. MT 1985 pp. 178–179. When writers like Nisot (p. 202) state that an expressly authorized reservation is to be considered as accepted once it is formulated they do not make the necessary distinctions.
130. That it may be difficult for the UN Secretary-General to hold the two rules apart is proven by the case of the Polish reservation to the Racial Discrimination Convention. See ch. 28.2.1.
131. Observations by the General Secretariat of the OAS to the Inter-American Court of Human Rights, Letter dated 16 August 1982. Kokott states that the view of the Court is not "verallgemeinerungsfähig" without analyzing the defects in the argumentation (p. 826).
132. See supra, p. 360 n.113.
133. Díez de Velasco makes the distinction between "recepciones de instrumentos en depósito" and "recepciones para depósito" (Naturaleza, p. 413).
134. UN Doc. A/ 5687, ILCYB 1965:II, p. 92; See also the Observations of the Government of the United States of America Concerning the Request for an Advisory Opinion Submitted by the Inter-American Commission on Human Rights, Letter dated 3 September 1982, p. 4.

135. Pleadings, pp. 18–19, Written Statement of the OAS; Fenwick, *Reservations* p. 147.
136. Between states not having objected to the reservation. As a result of Advisory Opinion No. OC-2/82 the Inter-American Juridical Committee has proposed changes to the 1973 Standards (1. CP/Doc. 1606/85 – Resolution approved by the Inter-American Juridical Committee on “Standards for the General Secretariat as Depositary of Inter-American Treaties”; 2. CP/Doc. 1607/85 – Resolution approved by the Inter-American Juridical Committee regarding “Standards on Reservations to Multilateral Treaties”). The Reservation Standards are nearly identical with the Vienna Convention rules, that means that the compatibility criterion would be adopted by the Pan-American reservation regime. The Depositary Standards have eliminated the 1-year consultation period. The IAJC has not ventured into the difference between ‘tender’ and ‘deposit’ of an instrument. The resolutions have not yet been discussed by the Permanent Council or the General Assembly of the OAS:
137. Within the OAS the scepticism towards the notion of compatibility has been constant down to the new Standards from 1973. The Inter-American Court of Human Rights recognized its relevance for the Inter-American Convention on Human Rights, Advisory Opinion, p. 14 para. 35. At the 2nd Inter-American Specialized Conference on Private International Law (CIDIP II) in Montevideo 1979 reservation clauses inserted in seven of the adopted conventions made reference to the compatibility criterion:

“Cada Estado podrá formular reservas a la presente Convención al momento de firmarla, ratificarla, o adherirse a ella, siempre que la reserva verse sobre una o más disposiciones específicas y que no sea incompatible con el objeto y fin de la Convención.” (AJIA 1979, p. 242).

138. UN Doc. A/5687, ILCYB 1965:II, p. 86.
139. The Dominican Republic made the following statement on signing the Commercial Aviation Convention reiterated on ratification:

“The Delegation of the Dominican Republic records, as an explanation of its vote, that upon signing the present Convention it does not understand that the Dominican Republic dissociates itself from the Conventions it has already ratified and which are in force.” (emphasis added)

Sexta Conferencia Interamericana, Habana 1928, p. 31f.

140. Quinta Conferencia Interamericana, Santiago 1923, Serie sobre derecho y tratados Núm. 19, p. 2; OASTS 16, p. 9.
141. Art. I(2) provides:

“This provision shall not abrogate nor limit the obligations contained in treaties of arbitration in force between two or more of the High Contracting Parties, nor the obligations out of them.”
142. Information received from the General Secretariat of the OAS. The US as depositary accepts instruments of ratification accompanied by “declarations” or “understandings” immediately for deposit, but information of such statements should be promptly communicated to other governments for information (Whiteman, p. 88).
143. Art. 38 of the 1964 European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders permits any contracting state to avail itself of reservations provided in the Annex of the Convention.
144. UN Doc. A/5687, ILCYB 1965:II, p. 86.
145. *Ibid.*, p. 94.
146. *Ibid.*, p. 93.
147. Golsong, p. 228.
148. The 1973 Convention on the Transfer of Corpses, the 1960 Arrangement, the 1965 Protocol and the 1974 Additional Protocol of Television Broadcasts, the 1968 Convention on Information on Foreign Law, the 1972 Convention on Registration of Wills and the 1968 Convention on Protection of Animals During Transport.

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149. Golsong, p. 229 n.26.
150. Ibid. See also Imbert, *Réserves*, p. 18 n.37.
151. Any acceptance or objection by Cyprus or some other state, member of the Council of Europe would in fact have no impact on the effects of the statement. The statement concerns the implementation *ratione personae* and not *ratione materiae* of the relevant treaties.
152. According to art. 3 of the Statute of the Council of Europe "Every Member of the Council of Europe must accept the principles of the rule of law of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I."

NOTES TO CHAPTER 29

1. Zoller, p. 371.
2. Where the present norm is a special case of a more general norm found in another valid treaty, the question may however be considered as lacking any regulation by treaty.
3. Thirlway, p. 121.
4. Because the reservation and its acceptance constitute a special agreement.
5. The present convention is a good example of a human rights treaty where reservations may affect the interest of other parties.
6. Mexico has made such a qualified objection to the Bangladesh reservation (UN Doc. A/40/623 p. 13) as well as to other reservations and the FRG has made qualified objections to both the Bangladesh and the Egyptian reservation as well as to some other reservations (C.N.306.1981. TREATIES-13 of 28 October 1981). Mexico and the FRG however declared that their objections would not preclude the entry into force of the Convention between them and the reserving states.
7. Egypt as a number of other ratifying states had not agreed to the compulsory disputes settlement procedure under art. 29(1).
8. However if an objecting state contends that the reservation rejecting the disputes settlement clause is an incompatible reservation, a court may be able to decide on the nature of such a reservation. It may be considered to be a case of the *compétence de la compétence*.
9. The European Court of Human Rights has in the *Ringeisen* (para. 18) and *Airey* (para. 26) cases stated its right to interpret reservations. See also *Temeltasch* case, para. 67. Vasak (Convention, p. 69) and Marcus-Helmons (p. 23) contend that the Commission has tended to give reservations an extensive interpretation, whereas national courts have tended to interpret them restrictively. Coussirat-Coustère, pp. 292–293; Vasak, p. 248. National courts will have difficulties in maintaining a different interpretation as given by the European Court of Human Rights (Vasak, p. 249). Also Koptezki (pp. 24–27) mentions that the Commission and the Court have tended to give reservations a broad application, but he sees a tendency in more recent cases towards a more restrictive view as e.g. in Application 8180/78 Eur.Court H.R. 1979 (p. 632).
10. The former provided a collegiate and the latter a judicial procedure for determining the compatibility of a reservation.
11. Swiss authorities and courts considered the true nature of the statement as established since the end of 1978. Malinverni & Wildhaber, 1981, p. 287. The Swiss Federal Justice Office contended on the one hand that decisions by the Council of Europe may be given a different impact in international courts, but on the other hand it was ready to admit that the character of the Swiss statement was bindingly established in 1978 when the European Court of Human Rights passed the decision in the *Luedicke* case. Avis de l'Office fédéral de la justice du 8 juin 1979. *Temeltasch* case, Collection of Decisions, p. 8. Submission of the Swiss government, Malinverni & Wildhaber 1981, p. 288.
12. Within the Council of Europe the system of 'constructive notice' prevails. See ch. 23 n.16.
13. The European Commission in the *Temeltasch* case argued in a way that made it clear that objections could well be possible even to treaties within the Council of Europe system, p. 144 paras. 60–61.
14. Imbert, Décision, p. 42.
15. Alchurrón & Bulygin, p. 167, "The postulate of completeness when taken as an assertion that every legal system is necessarily complete (i.e., closed) is not justified." It is however possible to wish that a normative system *should* be complete or closed, though it in fact is not.

ANNEXES

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1. **Resolution of the League Council of 17 July 1927 on the Question of the Admissibility of Reservations to General Conventions (Doc. C.266(2).1927. V. League of Nations Official Journal, July 1927, p. 800).**

“The Council;

“Takes note of the report and directs it to be circulated to the Members of the League;

“Requests the Secretary-General to be guided by the principles of the report regarding the necessity for acceptance by all the Contracting States, when dealing in future with reservations made after the close of a Conference at which a convention is concluded, subject, of course, to any special decisions taken by the Conference itself;

“Calls the attention of Conferences on technical subjects to the fact that, in cases where the text of a convention contains, in the opinion of the signatories, certain articles to which reservations can be made without prejudice to the other articles, a method similar to that adopted by the Customs Conference may certainly be recommended;

“Decides that the present report shall be circulated to the States Members of the League, together with the report of the Committee of Experts.”

2. **Situation relativement à la mise en vigueur du Protocole du 14 septembre 1929, concernant la revision du Statut de la Cour permanente de Justice internationale, Résolution adoptée le 25 septembre 1931 (Société des Nations Journal Officiel, Supplément spécial No 92, octobre 1931. Résolutions et vœux adoptés par l'Assemblée au cours de sa douzième session ordinaire (7 au 29 septembre 1931) p. 10).**

L'Assemblée:

Constate avec satisfaction que le Protocole du 14 septembre 1929 concernant la revision du Statut de la Cour permanente de Justice internationale a maintenant obtenu presque toutes les ratifications nécessaires pour assurer son entrée en vigueur;

Constate toutefois que la ratification de Cuba est sujette à une réserve que d'autres Etats ayant ratifié ce Protocole n'ont pas cru pouvoir accepter;

Considère qu'une réserve ne saurait être formulée lors de la ratification qu'avec l'assentiment de tous les autres Etats signataires ou pour autant que le texte de la Convention prévoit une telle réserve;

Prend acte de ce que le Gouvernement cubain a déclaré, par l'intermédiaire de son premier délégué, qu'il envisage le retrait de ladite réserve et exprime au Gouvernement cubain ses remerciements pour l'esprit de conciliation dont il a fait preuve en cette circonstance;

3. **Harvard Law School, Law of Treaties: Draft Convention with Comment (Prepared by the Research in International Law of the Harvard Law School (Harvard Draft), 29 AJIL 1935, Suppl. 4).**

ARTICLE 13. USE OF THE TERM "RESERVATION"

As the term is used in this Convention, a "reservation" is a formal declaration by which a State, when signing, ratifying or acceding to a treaty, specifies as a condition of its willingness to become a party to the treaty certain terms which will limit the effect of the treaty in so far as it may apply in the relations of that State with the other State or States which may be parties to the treaty.

ARTICLE 14. RESERVATIONS AT TIME OF SIGNATURE

Unless otherwise provided in the treaty itself,

(a) If a treaty is signed by all the signatories on the same date, a State may make a reservation when signing only with the consent of all other signatories.

(b) If a treaty is open for signature until a certain date, a State may make a reservation when signing only with the consent of all other States which sign before the date fixed.

(c) If a treaty is open for signature at any time in the future, a State may make a reser-

vation when signing, if it signs before the treaty has been brought into force, only with the consent of all the States which become signatories before the treaty is brought into force; if it signs after the treaty has been brought into force, only with the consent of all the States which have become signatories or parties prior to the time of signature by that State.

(d) If a State has made a reservation when signing a treaty, its later ratification will give effect to the reservation in the relations of that State with other States which have become or may become parties to the treaty.

ARTICLE 15. RESERVATIONS AT TIME OF RATIFICATION

Unless otherwise provided in the treaty itself,

(a) If a treaty is signed by all the signatories on the same date, a State may make a reservation when ratifying only with the consent of all other States which are signatories and of all the States which have acceded to the treaty prior to the ratification by that State.

(b) If a treaty is open for signature until a certain date, a State may make a reservation when ratifying only with the consent of all other States which become signatories before the date fixed and of all the States which have acceded to the treaty prior to the ratification by that State.

(c) If a treaty is open for signature at any time in the future, a State may make a reservation when ratifying, if it ratifies before the treaty has been brought into force, only with the consent of all other States which become signatories before the treaty is brought into force; if it ratifies after the treaty has been brought into force, only with the consent of all other States which have become signatories or have acceded to the treaty prior to the ratification by that State.

(d) If a State has made a reservation when ratifying a treaty, the reservation has effect only in the relations of that State with other States which have become or may become parties to the treaty.

ARTICLE 16. RESERVATIONS AT TIME OF ACCESSION

Unless otherwise provided in the treaty itself,

(a) A State may make a reservation when acceding to a treaty only with the consent of all the signatories to the treaty and of all States which have previously acceded to the treaty.

(b) If a State has made a reservation when acceding to a treaty, the reservation has effect only in the relations of that State with other States which have become or may become parties to the treaty.

4. Brierly's First Report on the Law of Treaties. (UN Doc. A/CN.4/23, ILCYB 1950: II, pp. 223-224).

Reservations to treaties

Article 10.

(1) Unless the contrary is therein indicated or otherwise follows from the nature of that treaty, a State or international organization may accept a treaty subject to a reservation, that is to say a special term limiting or varying the effect of that treaty in so far as concerns the relations of that State or organization with one or more of the existing or future parties to the treaty.

(2) Unless the contrary is indicated in a treaty, the text of a proposed reservation there-to must be authenticated together with the text or texts of that treaty or otherwise formally communicated in the same manner as an instrument or copy of an instrument of acceptance of that treaty.

(3) The acceptance of a treaty subject to a reservation is ineffective unless or until every State or international organization whose consent is requisite to the effectiveness of that reservation has consented thereto.

(4) Unless the contrary is indicated in the text of a treaty, a reservation proposed before the entry into force generally of a treaty is effective only if consented to expressly or impliedly by every State or international organization which may have taken part in the negotiation of that treaty, and a reservation proposed thereafter only if consented to by every one of the parties to that treaty.

(5) A State or international organization accepting a treaty impliedly consents to every reservation thereto of which that State or organization then has notice.

5. Brierly's Draft Articles on Reservations (UN Doc. A/CN.4/L.18, ILCYB 1951: II, pp. 26-27).

Part I

ADMISSIBILITY OF RESERVATIONS

A

No reservations shall be permitted to this Convention whether formulated before or after it has entered into force.

B

1. Each High Contracting Party may, at the time of signature, ratification, or accession notify the depositary that it desires to make a reservation to the Convention.

2. Such a reservation must be chosen from among those set forth in annex hereto.

C

1. Each High Contracting Party may, at the time of signature, ratification, or accession notify the depositary that it desires to make a reservation to the Convention.

2. If such a reservation is formulated by a State which has signed but not ratified the Convention it must be chosen from those set forth in annex hereto. If it is formulated by a State which has not signed the Convention but desires to become a party thereto it must be chosen from those set forth in annex hereto.

D

1. Each High Contracting Party may, at the time of signature, ratification, or accession notify the depositary that it desires to make a reservation to the Convention.

2. If such a reservation is formulated before the entry into force of the Convention the depositary shall consult with such governments as are entitled to consultation, as provided in article If it is formulated after the entry into force of the convention the central organ of the organization shall at its next meeting following the presentation of the reservation consider its admissibility and proceed to vote thereon.

E

The reservations to the application of the present convention set forth in the annex thereto are accepted in regard to the territories named therein.

Part II

STATES ENTITLED TO BE CONSULTED AS TO RESERVATIONS

The following classes of States shall be entitled to be consulted as to any reservations formulated after the signature of this convention (or after this convention has become open to signature or accession):

(a) States entitled to become parties to the convention,

(b) States having signed or ratified the convention,

(c) States having ratified or acceded to the convention.

Should the reservation have been formulated within x years of the date specified in the convention for the determination of the date of the entry into force, States whose signature of the convention has not been followed by ratification shall also be entitled to be consulted.

Note: It will be seen that the classes entitled to be consulted are set out in the gradually

decreasing number, the largest class being Class A and the smallest, Class C. It will be for the Drafting Commission to select which class it considers to be appropriate for the convention in question. The above classes therefore represent a series of options which will vary in practice, particularly according as to whether the day specified for determining the date of the entry into force of the convention has or has not arrived. (See Part III, article 3b and 3c.) The last paragraph of Part II has been added as taking into account the views expressed by Mr. Röling in the course of the debates of the Sixth Committee. (See annex A and also annex C, para. 9.) It should further be noted that Class A is included as an option, although opinion is divided as to whether in the absence of express provision this should be, or is, a class entitled to be consulted. All three classes are included in question III of the General Assembly resolution requesting an advisory opinion from the International Court of Justice (A/1517).

Part III

DEPOSITARY'S FUNCTIONS

1. The depositary for the purpose of this convention shall be (insert name of depositary).

2. Where any State deposits, together with its instrument of ratification or accession, or makes at the time of signature any formal declaration which purports to qualify or limit the effect of the Convention in so far as it may apply in the relation of that State with the other States which may be or become parties to the treaty, the depositary shall follow the procedure prescribed below.

3. The depositary shall:

(a) Whether or not the Convention is in force communicate the text of any reservation to the Government of all States on whose behalf the Convention has been signed or who are parties or entitled to become parties to the Convention;

(b) If the day specified in the Convention for the determination of the date on which it shall enter into force has not yet arrived, enquire of all States entitled to be consulted (selected from Part II) whether or not they accept the reservation;

(c) If the day specified in the Convention for the determination of the date on which it shall enter into force has passed, enquire of all States entitled to be consulted (selected from Part II) whether or not they accept the reservation.

Part IV

PROCEDURE FOR OBJECTIONS

1. Where such an enquiry as is specified in article 3 (b) of Part III above is made, any of the governments to whom it is addressed may, at any time before the day specified in that Article, notify the depositary it does not accept the reservation.

2. Where such an enquiry as is specified in article 3 (c) of Part III is made, any of the Governments to whom it is addressed may, at any time within x months of such inquiry, notify the depositary that it does not accept the reservation.

3. In the event of any Government notifying the depositary, pursuant to paragraphs (1) or (2) above, that it does not accept the reservation, the depositary shall so inform the Government desiring to make the reservation, and request it to inform him:

(a) If the notification is made under paragraph (1), within x months, or at any time before the day specified in article 3 (b), whichever period is the longer,

(b) If the notification is made under paragraph (2), within x months of the date of the request, whether it is prepared to withdraw the reservation, and, if, within the appropriate period, as defined in sub-paragraph (a) and (b) above, that Government has not replied, it shall be deemed not to be a party (or a signatory) to the Convention.

4. If, in reply to the request by the depositary specified in paragraph (3) the Government desiring to make the reservation states that it desires to withdraw the reservation, it shall be deemed to be a party (or signatory) to the Convention as from the date when its reply is received by the depositary.

5. If, within the appropriate period as prescribed in paragraphs (1) and (2) above no objection to the reservation has been received by the depositary, it shall be treated as accepted by all States entitled to be consulted and the Government making the reservation shall be deemed to be a party to the Convention as from the date when the above-mentioned period has expired.

6. If the Government desiring to make the reservation states, in reply to the enquiry by the depositary specified in paragraph (3), that it maintains its reservation:

(i) It shall not be a party to the Convention;
or

(ii) It shall be a party to the Convention but shall not be bound under it in relation to any State:

(a) Which has notified the depositary that it does not accept the reservation,

(b) Which, by reason of the fact that it was not among the States entitled, under this Convention, to be consulted at the time the reservation was formulated, did not receive the enquiry provided for in articles 3 (a) and 3 (b) of Part III.

Note: The options provided in paragraph (6) represent two different practices now current, but, as pointed out in the Report, it may be desirable, for special reasons and in the case of particular Conventions, to depart from whichever practice is usual amongst the High Contracting Parties. See annex C, para. 13.

6. **Lauterpacht's First Report on the Law of Treaties (UN Doc. A/CN.4/63, ILCYB 1953: II, pp. 91-92).**

Article 9

RESERVATIONS

I

A signature, ratification, accession, or any other method of accepting a multilateral treaty is void if accompanied by a reservation or reservations not agreed to by all other parties to the treaty.

II

Alternative proposals de lege ferenda

Alternative draft A of article 9

If, in any case where a multilateral treaty does not expressly prohibit or restrict the faculty of making reservations, a State signs, ratifies, accedes to or otherwise accepts the treaty subject to a reservation or reservations limiting or otherwise varying the obligations of any article or articles of the treaty, the following procedure shall apply in the absence of any other provisions in the treaty:

1. Whenever a treaty provides that it shall enter into force on a specified number of States finally becoming parties thereto, the fact a State has appended a reservation or reservations to any article of the treaty is not taken into account for the purpose of ascertaining the existence of the requisite number of parties to the treaty.

2. If within three years of the treaty having entered into force less than two-thirds of the States accepting the treaty, whether they have

accepted it with or without reservations, agree to the reservation or reservations appended by a State, that State, if it maintains the reservation, ceases to be a party thereto. If at the end of that period and as the result of the operation of the rule as stated, the number of parties is reduced to below the requisite number stipulated for the entrance of the treaty into force, the treaty is dissolved.

3. If, at the end of or subsequent to the period referred to above, a reservation is agreed to expressly or tacitly by two-thirds or more of the total number of the States accepting the obligations of the treaty, then the State making the reservation is deemed to be a party to the treaty in respect of all parties thereto subject to the right of the other parties not to consider themselves bound by the particular clause of the treaty in relation to the State making the reservation.

4. A State is deemed to have agreed to a reservation made by another State if, within three months of the receipt of notification of the reservation in question, it has not forwarded to the depositary authority a statement containing a formal rejection of the reservation.

Alternative draft B of article 9

If, in any case where a multilateral treaty does not expressly prohibit or limit the faculty of making reservations, a State signs, ratifies, accedes to or otherwise accepts the treaty subject to a reservation or reservations limiting or otherwise varying the obligations of any article or articles of the treaty, the following procedure shall apply in the absence of any other provisions in the treaty:

1. The text of the reservations received shall be communicated by the depositary authority to all the interested States. If, on the expiry of a period of three months following the receipt of such communication, an interested State does not notify the depositary authority that it disagrees with the reservation, it shall be deemed to have accepted it.

2. Unless, after an interval prescribed by the convention, two-thirds of the States qualified to offer objections have accepted the reservation, the reserving State, if it maintains its reservation, will not be considered a party to the treaty.

3. If two-thirds or more of the States referred to in paragraph 2 agree to the reservation, the reserving State will be considered a party to the treaty subject to the right of any party not to apply to the reserving State the provision of the treaty in respect of which a reservation has been made.

Alternative draft C of article 9

If, in any case where a multilateral treaty does not expressly prohibit or limit the faculty of making reservations, a State signs, ratifies, accedes to or otherwise accepts the treaty subject to a reservation or reservations limiting or otherwise varying the obligations of any article or articles of the treaty the following procedure shall apply in the absence of any other provisions in the treaty:

1. The parties or the organ of an international organization responsible for establishing the text of the treaty shall designate a committee, appointed in a manner to be agreed by them, competent to decide on the admissibility of reservations made by any Government subsequent to the establishment of the text of the treaty.

2. The text of the reservations received shall be communicated by the depositary authority to all the interested States. If, on the expiry of a period of three months following the receipt of such communication an interested State does not notify the depositary authority that it disagrees with the reservation, it shall be deemed to have accepted it.

3. If a reservation is objected to by a State qualified to object, then it shall be competent for the Committee, at the request of the State making the reservation, to decide whether the reservation is admissible. If the reservation is declared inadmissible then the State in question cannot become a party to the treaty if it maintains the reservation.

Alternative draft D of article 9

If, in any case where a multilateral treaty does not expressly prohibit or limit the faculty of making reservations, a State signs, ratifies, accedes to or otherwise accepts the treaty subject to a reservation or reservations limiting or otherwise varying the obligations of any article or articles of the treaty the following procedure shall apply in the absence of any other provisions in the treaty:

1. The parties or the organ of an international organization responsible for establishing the text of the treaty shall request the International Court of Justice to designate under its rules a Chamber of Summary Procedure to decide on the admissibility of reservations made by a Government subsequent to the establishment of the text of the treaty.

2. The text of the reservations received shall be communicated by the depositary authority to all the interested States. If, on the expiry of a period of three months following the receipt of such communication, an interested State

does not notify the depositary authority that it disagrees with the reservation, it shall be deemed to have accepted it.

3. If a reservation is objected to by a State qualified to object, then it shall be competent for the Chamber of Summary Procedure, at the request of the State making the reservation, to decide whether the reservation is admissible. If the reservation is declared inadmissible then the State in question cannot become a party to the treaty if it maintains the reservation.

7. Fitzmaurice's First Report on the Law of Treaties (UN Doc. A/CN.4/101, ILCYB 1956: II, pp. 115-116).

Article 37. Reservations (fundamental rule)

1. Only those reservations which involve a derogation of some kind from the substantive provisions of the treaty concerned are properly to be regarded as such, and the term reservation herein is to be understood as limited in that sense.

2. Reservations must be formally framed and proposed in writing, or recorded in some form in the minutes of a meeting or conference; must be brought to the knowledge of the other interested States; and, subject to articles 38 and 39 below, must be assented to expressly or tacitly by all those States.

3. In those cases where the treaty itself permits certain specific reservations, or a class of reservations, to be made, there is a presumption that any other reservations are excluded and cannot be accepted.

4. In no case can a reservation be made or admitted by any article of a treaty providing for the settlement of differences or disputes concerning the interpretation or application of that treaty, by means of a reference to the International Court of Justice or other international tribunal, to arbitration, conciliation, or by other specified means.

Article 38. Reservations to bilateral treaties and other treaties with limited participation

In the case of bilateral treaties, or plurilateral treaties made between a limited number of States for purposes specially interesting those States, no reservations may be made, unless the treaty in terms so permits, or all the other negotiating States expressly so agree.

Article 39. Reservation to multilateral treaties

1. In the case of general multilateral treaties,

a State may, subject to paragraphs 3 and 4 of article 37 above, make a reservation, when signing, ratifying, accepting or acceding to it:

(a) If the treaty expressly permits reservations to be made, either generally, or as regards a particular article or articles, or class of provision, and the reservation concerned falls within the terms of the treaty;

(b) Provided there is nothing to the contrary in the treaty:

(i) If the intention to make a particular reservation or reservations has been specially mentioned during the negotiation and drawing up of the treaty, and has not met with any objection (i.e., has been acquiesced in, expressly or tacitly);

(ii) If the reservation has subsequently been circulated to all the States which have taken part in the negotiation and drawing up of the treaty or which, by giving their signature, ratification, accession or acceptance, have manifested their interest in it, and the reservation has similarly not met with objection; provided that if the treaty has been in force for not less than five years, the reservation need only be circulated to and be met with absence of objection on the part of the States actually parties to the treaty at the date of circulation, so long as these number not less than twenty per cent of the States originally entitled to become parties.

2. For the purpose of these provisions, tacit acquiescence includes acquiescence *sub silentio*, and may be assumed if no objection is evinced prior to the signature of the treaty or, in the case of reservations proposed later, within three months of the date of their circulation.

3. If a reservation meets with objection, and if the objection is maintained notwithstanding any explanations or assurances given by the reserving State, the latter cannot become, or rank as, a party to the treaty unless the reservation is withdrawn.

4. Unless and until a reservation has been circulated, and is ascertained to have met with no final objection, and thus to have been accepted, the reserving State cannot be taken into account in any computation of the number of the parties to the treaty for example, if the treaty is to come into force on being ratified by a certain number of States, or for the purpose of determining the number of States parties to the treaty under the proviso to paragraph 1 (b) (ii) above.

Article 40. Reservations (legal effects if admitted)

1. If a reservation is admitted in accordance with the preceding articles, its effect is:

(a) To permit the reserving State to derogate from the provisions of the treaty to the extent, or in the manner, indicated in the reservations, but no more — the terms of the reservation being construed strictly for this purpose;

(b) To permit a similar derogation on the part of the other parties to the treaty in their relations with the reserving State, which cannot claim from them a greater degree of compliance with the treaty than it undertakes itself.

2. A reservation admitted for one party to a treaty, only effects relations between the reserving State and each of the other parties, and has no effect on the relations of the other parties *inter se*.

3. A reservation, though admitted, may be withdrawn by formal notice at any time. If this occurs, the previously reserving State becomes automatically bound to comply fully with the provision of the treaty to which the reservation related, and is equally entitled to claim compliance with that provision by the other parties.

8. **Waldock's First Report on the Law of Treaties** (UN Doc. A/CN.4/144, ILCYB 1962: II, pp. 31–32, 60–62).

Chapter I. General provisions

ARTICLE 1. DEFINITIONS

(1) “*Reservation*” means a unilateral statement whereby a State, when signing, ratifying, acceding to or accepting a treaty, specifies as a condition of its consent to be bound by the treaty a certain term which will vary the legal effect of the treaty in its application between that State and the other party or parties to the treaty. An explanatory statement or statement of intention or of understanding as to the meaning of the treaty, which does not amount to a variation in the legal effect of the treaty, does not constitute a reservation.

ARTICLE 17. POWER TO FORMULATE AND WITHDRAW RESERVATIONS

1. (a) A State is free, when signing, ratifying, acceding to or accepting a treaty, to formulate a reservation, as defined in article 1, unless:

- (i) The making of reservations is prohibited by the terms of the treaty, or excluded by the nature of the treaty or by the establishing usage of an international organization; or
- (ii) The treaty expressly restricts the making of reservations to a specified category, or specified categories, of reservation

and the reservation in question does not fall within the category or categories mentioned in the treaty; or

- (iii) The treaty expressly authorizes the making of a specified category, or specified categories, of reservation, in which case the formulation of reservations falling outside the authorized category or categories is by implication excluded.

(b) The formulation of a reservation, the making of which is expressly prohibited or impliedly excluded under any of the provisions of sub-paragraph (a), is inadmissible unless the prior consent of all the other interested States has been first obtained.

2. (a) When formulating a reservation under the provisions of paragraph 1 (a) of this article, a State shall have regard to the compatibility of the reservation with the object and purpose of the treaty.

(b) The effect of the formulation of a reservation upon the legal relations between the reserving State and the other State or States signing, ratifying, acceding to or accepting the treaty shall be determined by reference to the provisions of articles 18 and 19 below.

3. (a) Reservations shall be formulated in writing either:

- (i) On the face of the treaty itself, and normally in the form of an adjunct to the signature of the representative of the reserving State;
- (ii) In a Final Act of a conference, protocol, *procès-verbal* or other instrument related to the treaty and executed by a duly authorized representative of the reserving State;
- (iii) In the instrument by which the reserving State ratifies, accedes to or accepts the treaty, or in a *procès-verbal* or other instrument accompanying the instrument of ratification, accession or acceptance and drawn up by the competent authority of the reserving State.

(b) A reservation formulated at the time of a signature which is subject to ratification or acceptance shall continue to have effect only if the instrument of ratification or acceptance either repeats the reservation or incorporates it by reference, or the reserving State at the time of ratification clearly expresses in some other manner its intention to maintain the reservation.

4. (a) The formulation of a reservation when signing a treaty at a meeting or conference of the negotiating States shall be communicated to the representatives of the other signatory State or States at or before the time of signature of the treaty. Such communication shall be pre-

sumed in the case of a reservation formulated in the manner mentioned in sub-paragraph (a) (i) and (ii) of the preceding paragraph.

(b) The formulation of a reservation by a State signing, ratifying, acceding to, or accepting a treaty subsequently to the meeting or conference at which it was adopted shall be communicated to all other States which are, or are entitled to become, parties in accordance with the procedure, if any, prescribed in the treaty for such communications.

(c) If no procedure has been prescribed in the treaty in regard to the communication of reservations but the treaty designates a depositary of the instruments relating to the treaty, then the formulation of the reservation shall be communicated to the depositary, whose duty it shall be:

- (i) To transmit the text of the reservation to all other States who are, or are entitled to become, parties to the treaty; and
- (ii) To draw the attention of such States to the time limit within which an objection to the reservation should be filed under the provisions of the treaty or, failing any such provisions, under paragraph 3 (b) of the next succeeding article.

5. However, in any case where a reservation is formulated to an instrument which is the constituent instrument of an international organization and the reservation is not one specifically authorized by such instrument, it shall be communicated to the Head of the secretariat of the organization concerned in order that the question of its admissibility may be brought before the competent organ of such organization.

6. A State which has formulated a reservation is free to withdraw it unilaterally, either in whole or in part, at any time, whether the reservation has been accepted or rejected by the other States concerned. Withdrawal of the reservation shall be effected by written notification to the depositary of instruments relating to the treaty and, failing any such depositary, to every State which is or is entitled to become a party to the treaty.

ARTICLE 18. CONSENT TO RESERVATIONS AND ITS EFFECTS

1. A reservation, since it purports to modify the terms of the treaty as adopted, shall only be effective against a State which has given, or is presumed to have given, its consent thereto in accordance with the provisions of the following paragraphs of this article.

2. (a) Consent to a reservation shall be held to have been given expressly if such consent is stated:

- (i) In the treaty itself;

- (ii) In the Final Act of the conference at which the treaty was drawn up, in a protocol of signature or of exchange of ratifications, in a *procès-verbal* or other instrument related to the treaty and executed by a duly authorized representative of the consenting State;

- (iii) In the instrument by which the consenting State ratifies, accedes to or accepts the treaty, or in a *procès-verbal* or other instrument accompanying the instrument of ratification, accession or acceptance and drawn up by the competent authority of the consenting State;

- (iv) In a formal notification of such consent issued by the competent authority of the consenting State and addressed either to the State or States concerned or to the depositary of instruments relating to the treaty.

(b) Consent to a reservation shall also be held to have been given expressly where the treaty itself authorized the making of a particular reservation or category of reservations and the reservation falls within the terms of the authorization.

3. (a) Any State which is or is entitled to become a party to a treaty shall be deemed to have consented to a reservation in any case where the reservation was formulated on the face of the treaty or in the Final Act of the conference or in a *procès verbal* or other instrument related to the treaty and it then made no objection to the reservation.

(b) Any such State shall also be deemed to have consented to a reservation to a plurilateral or multilateral treaty in any case where the reservation was communicated to the State in question and twelve calendar months have since elapsed without any notice of objection to the reservation having been lodged by that State; provided that, in the case of a multilateral treaty, a State which at the time of such communication was not a party to the treaty shall not be deemed to have consented to the reservation if it shall subsequently lodge an objection to the reservation, when executing the act or acts necessary to qualify it to become a party to the treaty.

(c) A State which acquires the right to become a party to a treaty after a reservation has already been formulated shall be presumed to consent to the reservation:

- (i) In the case of a plurilateral treaty, if it executes the act or acts necessary to enable it to become a party to the treaty;
- (ii) In the case of a multilateral treaty, if it executes the act or acts necessary to qualify it to become a party to the treaty with-

out signifying its objection to the reservation.

4. (a) In the case of a bilateral treaty, the consent of the other negotiating State to the reservation shall automatically establish the reservation as a term of the treaty between the two States.

(b) Unless the treaty shall otherwise provide or another rule be applicable under the constitution or usages of an international organization or under a decision of its competent organ:

(i) The consent, express or implied, of all the States participating in the adoption of the text of a plurilateral treaty is necessary to establish the admissibility of a reservation not specifically authorized by the treaty, and to constitute the reserving State a party to the treaty; provided that the consent of a State which after the expiry of twelve months from the date of lodging an objection has not yet executed a definitive act qualifying it to become a party to the treaty shall be dispensed with, and provided that, if the treaty is in force and not less than four years have elapsed since the adoption of its text, the consent only of the parties to the treaty shall be required;

(ii) The consent, express or implied, of any other State which is a party or a presumptive party to a multilateral treaty shall suffice, as between that State and the reserving State, to establish the admissibility of a reservation not specifically authorized by the treaty, and shall at once constitute the reserving State a party to the treaty with respect to that State.

(c) In the case of a plurilateral or multilateral treaty which is the constituent instrument of an international organization, the consent of the organization, expressed through a decision of its competent organ, shall be necessary to establish the admissibility of a reservation not specifically authorized by such instrument, and to constitute the reserving State a party to the instrument.

5. (a) When the treaty has entered into force, a reservation which has been established as admissible in accordance with the provisions of the present article shall operate:

(i) To exempt the reserving State from the provisions of the treaty to which the reservation relates to the extent of the matters covered by the reservation; and

(ii) Reciprocally to entitle any other party to the treaty to claim the same exemptions from the provisions of the treaty in its relations with the reserving State.

(b) The reservation of one party to a plu-

lateral or multilateral treaty shall operate only as between the reserving State and the other parties to the treaty; it shall not affect in any way the rights and obligations of the other parties to the treaty *inter se*.

ARTICLE 19. OBJECTION TO RESERVATIONS AND ITS EFFECTS

1. (a) With the exception of the cases mentioned in sub-paragraph (b), any State which is or is entitled to become a party to a treaty shall have the right to object to any reservation not specifically authorized by the terms of the treaty.

(b) In the case of a plurilateral treaty, however, a State shall not have the right to object to a reservation:

(i) If it acquired the right to become a party to the treaty after the reservation had already been formulated; or

(ii) If more than four years have elapsed since the adoption of the text or the treaty and it has not yet executed the act or acts necessary to enable it to become a party to the treaty.

2. (a) An objection to a reservation shall be formulated in writing by the competent authority of the objecting State or by a representative of the State duly authorized for that purpose.

(b) The objection shall be communicated to the reserving State and to all other States, which are or are entitled to become parties to the treaty, in accordance with the procedure, if any, prescribed in the treaty for such communications.

(c) If no procedure has been prescribed in the treaty but the treaty designates a depositary of the instruments relating to the treaty, then the lodging of the objection shall be communicated to the depositary whose duty it shall be:

(i) To transmit the text of the objection to the reserving State and to all other States which are or are entitled to become parties to the treaty; and

(ii) To draw the attention of the reserving State and the other States concerned to any provisions in the treaty relating to objections to reservations.

3. (a) In the case of a plurilateral or multilateral treaty, an objection to a reservation shall not be effective unless it has been lodged before the expiry of twelve calendar months from the date when the reservation was formally communicated to the objecting State; provided that, in the case of a multilateral treaty, an objection by a State which at the time of such communication was not a party to the treaty shall nevertheless be effective if subse-

quently lodged when the State executes the act or acts necessary to enable it to become a party to the treaty.

(b) In the case of a plurilateral treaty, an objection by a State which has not yet become a party to the treaty, either actual or presumptive, shall:

(i) Cease to have effect, if the objecting State shall not itself have executed a definitive act of participation in the treaty within a period of twelve months from the date when the objection was lodged;

(ii) Be of no effect, if the treaty is in force and four years have already elapsed since the adoption of its text.

4. When an objection has been made to a reservation in conformity with the provisions of the present article and the reserving State does not withdraw its reservation:

(a) In the case of a bilateral treaty, the treaty falls to the ground;

(b) In the case of a plurilateral treaty, unless the treaty shall otherwise provide or another rule be applicable under the constitution or usages of an international organization or under a decision of its competent organ, the reserving State shall be excluded from participation in the treaty;

(c) In the case of a multilateral treaty, the objections shall preclude the entry into force of the treaty as between the objecting and the reserving States, but shall not preclude its entry into force as between the reserving State and any other State which does not object to the reservation;

(d) In the case of a treaty which is the constituent instrument of an international organization, the decision of the competent organ of the organization rejecting the reservation shall exclude the reserving State from participation in the treaty.

5. A State which has lodged an objection to a reservation shall be free to withdraw it unilaterally, either in whole or in part, at any time. Withdrawal of the objection shall be effected by written notification to the depositary of the instruments relating to the treaty, and failing any such depositary, to every State which is or is entitled to become a party to the treaty.

9. Report of the International Law Commission to the General Assembly covering the work of its 14th session, 24 April–29 June 1962 (UN Doc. A/5209, ILCYB 1962: II, pp. 175–182).

II. Draft articles on the law of treaties

Part I

**CONCLUSION, ENTRY INTO FORCE AND
REGISTRATION OF TREATIES
SECTION I. GENERAL PROVISIONS**

Article 1

Definitions

(f) “Reservation” means a unilateral statement made by a State, when signing, ratifying, acceding to, accepting or approving a treaty, whereby it purports to exclude or vary the legal effect of some provisions of the treaty in its application to that State.

SECTION III. RESERVATIONS

Article 18

Formulation of reservations

1. A State may, when signing, ratifying, acceding to, accepting or approving a treaty, formulate a reservation unless:

(a) The making of reservations is prohibited by the terms of the treaty or by the established rules of an international organization; or

(b) The treaty expressly prohibits the making of reservations to specified provisions of the treaty and the reservation in question relates to one of the said provisions; or

(c) The treaty expressly authorizes the making of a specified category of reservations, in which case the formulation of reservations falling outside the authorized category is by implication excluded; or

(d) In the case where the treaty is silent concerning the making of reservations, the reservation is incompatible with the object and purpose of the treaty.

2. (a) Reservations, which must be in writing, may be formulated:

(i) Upon the occasion of the adoption of the text of the treaty, either on the face of the treaty itself or in the final act of the conference at which the treaty was adopted, or in some other instrument drawn up in connection with the adoption of the treaty;

(ii) Upon signing the treaty at a subsequent date; or

(iii) Upon the occasion of the exchange or deposit of instruments of ratification, accession, acceptance or approval, either

in the instrument itself or in a *procès verbal* or other instrument accompanying it.

(b) A reservation formulated upon the occasion of the adoption of the text of a treaty or upon signing a treaty subject to ratification, acceptance or approval shall only be effective if the reserving State, when carrying out the act establishing its own consent to be bound by the treaty, confirms formally its intention to maintain its reservation.

3. A reservation formulated subsequently to the adoption of the text of the treaty must be communicated:

(a) In the case of a treaty for which there is no depositary, to every other State party to the treaty or to which it is open to become a party to the treaty; and

(b) In other cases, to the depositary which shall transmit the text of the reservation to every such State.

Article 19

Acceptance of and objection to reservations

1. Acceptance of a reservation not provided for by the treaty itself may be expressed or implied.

2. A reservation may be accepted expressly:

(a) In any appropriate formal manner on the occasion of the adoption or signature of a treaty, or of the exchange or deposit of instruments of ratification, accession, acceptance or approval; or

(b) By a formal notification of the acceptance of the reservation addressed to the depositary of the treaty or, if there is no depositary, to the reserving State and every other State entitled to become a party to the treaty.

3. A reservation shall be regarded as having been accepted by a State if it shall have raised no objection to the reservation during a period of twelve months after it received formal notice of the reservation.

4. An objection by a State which has not yet established its own consent to be bound by the treaty shall have no effect if after the expiry of two years from the date when it gave formal notice of its objection it has still not established its consent to be bound by the treaty.

5. An objection to a reservation shall be formulated in writing and shall be notified:

(a) In the case of a treaty for which there is no depositary, to the reserving State and to every other State party to the treaty or to which it is open to become a party; and

(b) In other cases, to the depositary.

Article 20

The effect of reservations

(a) A reservation expressly or impliedly permitted by the terms of the treaty does not require any further acceptance.

(b) Where the treaty is silent in regard to the making of reservations, the provisions of paragraphs 2 to 4 below shall apply.

2. Except in cases falling under paragraphs 3 and 4 below and unless the treaty otherwise provides:

(a) Acceptance of a reservation by any State to which it is open to become a party to the treaty constitutes the reserving State a party to the treaty in relation to such State, as soon as the treaty is in force;

(b) An objection to a reservation by a State which considers it to be incompatible with the object and purpose of the treaty precludes the entry into force of the treaty as between the objecting and the reserving State, unless a contrary intention shall have been expressed by the objecting State.

3. Except in the case falling under paragraph 4 below, the effect of a reservation to a treaty which has been concluded between a small group of States shall be conditional upon its acceptance by all the States concerned unless:

(a) The treaty otherwise provides; or

(b) The States are members of an international organization which applies a different rule to treaties concluded under its auspices.

4. Where the treaty is the constituent instrument of an international organization and objection has been taken to a reservation, the effect of the reservation shall be determined by decision of the competent organ of the organization in question, unless the treaty otherwise provides.

Article 21

The application of reservations

1. A reservation established in accordance with the provisions of article 20 operates:

(a) To modify for the reserving State the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) Reciprocally to entitle any other State party to the treaty to claim the same modification of the provisions of the treaty in its relations with the reserving State.

2. A reservation operates only in the relations between the other parties to the treaty which have accepted the reservation and the reserving State; it does not affect in any way the rights or obligations of the other parties to the treaty *inter se*.

Article 22

The withdrawal of reservations

1. A reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal. Such withdrawal takes effect when notice of it has been received by the other States concerned.

2. Upon withdrawal of a reservation the provisions of article 21 cease to apply.

10. **1965 Revised Draft Articles. Waldock's Fourth Report on the Law of Treaties (UN Doc. A/CN.4/177 and Add. 1 and 2, ILCYB 1965: II, pp. 15, 45-56).**

SECTION I: GENERAL PROVISIONS

Article 1

Definitions

(f) "Reservation" means a unilateral statement made by a State, when signing, ratifying, acceding to, accepting or approving a treaty, whereby it purports to exclude or vary the legal effect of certain provisions of the treaty in its application to that State.

"Article 18

"Treaties permitting or prohibiting reservations

"1. A reservation permitted by the terms of the treaty is effective without further acceptance by the interested States, unless the treaty otherwise provides.

"2. Unless expressly agreed to by all interested States, a reservation is inadmissible when:

"(a) the making of the reservation is prohibited by the treaty or by the established rules of an international organization;

"(b) the treaty expressly authorizes the making of specified reservations which do not include the reservation in question."

"Article 19

"Treaties silent concerning reservations

"1. Where a treaty is silent on the question of reservations, reservations may be proposed provided that they are compatible with the object and purpose of the treaty. In any such case the acceptance or rejection of the reservation shall be determined by the rules in the following paragraphs.

"2. When it appears from the nature of a treaty, the fewness of its parties or the circumstances of its conclusion that the application of its provisions between all the parties is to be

considered an essential condition of the treaty, the reservation shall be effective only on its acceptance by all the parties.

"3. Subject to article 3 (*bis*), when a treaty is a constituent instrument of an international organization, acceptance of a reservation shall be determined by the competent organ of the international organization.

"4. In other cases, unless the State concerned otherwise specifies:

"(a) acceptance of a reservation by any party constitutes the reserving State a party to the treaty in relation to such party;

"(b) objection to a reservation by any party precludes the entry into force of the treaty as between the objecting and the reserving State.

"5. In cases falling under paragraph 4 a reserving State is to be considered a party to the treaty if and when one other State which has established its consent to be bound by the treaty shall have accepted the reservation."

"Article 20

"Procedure regarding reservations

"1. A reservation must be in writing. If put forward subsequently to the adoption of the text of the treaty, it must be notified to the depositary or, where there is no depositary, to the other interested States.

"2. A reservation put forward upon the occasion of the adoption of the text or upon signing a treaty subject to ratification, acceptance or approval, shall be effective only if the reserving State formally confirms the reservation when ratifying, accepting or approving the treaty.

"3. Acceptance of a reservation, if express, takes place:

"(a) In any appropriate formal manner on the occasion of the adoption of the text or signature of the treaty or of the exchange or deposit of an instrument of ratification, accession, acceptance or approval;

"(b) By notification to the depositary or, if there is no depositary, to the reserving State and to the other interested States.

"4. In cases falling under article 19, paragraph 4, a reservation shall be considered to have been accepted by any State:

"(a) which, having had notice of it for not less than twelve months, proceeds to establish its consent to be bound by the treaty without objecting to the reservation; or

"(b) which raises no objection to the reservation during a period of twelve months after it established its consent to be bound by the treaty.

"5. An objection to a reservation must be in

writing. If put forward subsequently to the adoption of the text of the treaty, it must be notified to the depositary or, where there is no depositary, to the reserving State and to the other interested States.

"6. An objection to a reservation has effect only when the objecting State shall have established its consent to be bound by the treaty."

Article 21

The application of reservations

1. A reservation established as effective under the provisions of articles 18–20 operates:"

(a) To modify for the reserving State the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) Reciprocally to modify the provisions of the treaty to the same extent for each party to the treaty in its relations with the reserving State."

2. A reservation operates only in the relations between the other parties to the treaty which have accepted the reservation and the reserving State; it does not affect in any way the rights or obligations of the other parties to the treaty *inter se*.

Where a State objects to the reservation of another State, but the two States nevertheless consider themselves to be mutually bound by the treaty, the provision to which the reservation relates shall not apply in the relations between those States.

Article 22

The withdrawal of reservations

"Unless the treaty otherwise provides –

"(a) a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal;

"(b) such withdrawal becomes operative¹⁰⁶ when notice of it has been received by the other States concerned from the depositary or, if there is no depositary, from the reserving State;

"(c) on the date when the withdrawal becomes operative article 21 ceases to apply, provided that during a period of three months after that date a party may not be considered as having infringed the provision to which the reservation relates by reason only of its having failed to effect any necessary changes in its internal law or administrative practice."

11. **Report of the International Law Commission to the General Assembly on the work of the first part of its 17th session, 3 May–9 July 1965 (ILCYB 1965: II, pp. 160, 161–162).**

Article 1. Use of terms

1. For the purposes of the present articles:

Part I. – Conclusion, entry into force and registration of treaties

Section I: General Provisions

(f) "Reservations" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, acceding to, accepting or approving a treaty, whereby it purports to exclude or to vary the legal effect of certain provisions of the treaty in their application to that State.

Section III: Reservations to multilateral treaties

Article 18. Formulation of reservations

A State may, when signing, ratifying, acceding to, accepting or approving a treaty, formulate a reservation unless:

(a) The reservation is prohibited by the treaty or by the established rules of an international organization;

(b) The treaty authorizes specified reservations which do not include the reservation in question; or

(c) In cases where the treaty contains no provisions regarding reservations, the reservation is incompatible with the object and purpose of the treaty.

Article 19. Acceptance of and objection to reservations

1. A reservation expressly or impliedly authorized by the treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.

2. When it appears from the limited number of the contracting States, the object and purpose of the treaty and the circumstances of its conclusion that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound, a reservation requires acceptance by all the State parties to the treaty.

3. When a treaty is a constituent instrument of an international organization, the reservation requires the acceptance of the competent organ of that organization, unless the treaty otherwise provides.

4. In cases not falling under the preceding paragraphs of this article:

(a) Acceptance by another contracting State of the reservation constitutes the reserving State a party to the treaty in relation to that State if or when the treaty is in force;

(b) An objection by another contracting State to a reservation precludes the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is expressed by the objecting State;

(c) An act expressing the State's consent to be bound which is subject to a reservation is effective as soon as at least one other contracting State which has expressed its own consent to be bound by the treaty has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

Article 20. Procedure regarding reservations

1. A reservation, an express acceptance of a reservation, and an objection to a reservation must be formulated in writing and communicated to the other contracting States.

2. If formulated on the occasion of the adoption of the text or upon signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation. However, an objection to the reservation made previously to its confirmation does not itself require confirmation.

Article 21. Legal effects of reservations

1. A reservation established with regard to another party in accordance with articles 18, 19 and 20:

(a) Modifies for the reserving State the provisions of the treaty to which the reservations relates to the extent of the reservation; and

(b) Modifies those provisions to the same extent for such other party in its relation with the reserving State.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

3. When a State objecting to a reservation agrees to consider the treaty in force between itself and the reserving State, the provisions to which the reservation relates do not apply as

between the two States to the extent of the reservation.

Article 22. Withdrawal of reservations

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides or it is otherwise agreed, the withdrawal becomes operative when notice of it has been received by the other contracting States.

12. Report of the International Law Commission to the UNGA on the work of the second part of its 7th session, 3-28 January 1966 (ILCYB 1966: II, pp. 178-180).

Article 2. Use of terms

1. For the purposes of the present articles:

(d) "Reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, acceding to, accepting or approving a treaty, whereby it purports to exclude or to vary the legal effect of certain provisions of the treaty in their application to that State.

Section 2: Reservations to multilateral treaties

Article 16. Formulation of reservations

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) The reservation is prohibited by the treaty;

(b) The treaty authorizes specified reservations which do not include the reservation in question; or

(c) In cases where the treaty contains no provisions regarding reservations, the reservation is incompatible with the object and purpose of the treaty.

Article 17. Acceptance of and objection to reservations

1. A reservation expressly or impliedly authorized by the treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.

2. When it appears from the limited number of the negotiating States and the object and purpose of the treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires

acceptance by all the parties.

3. When a treaty is a constituent instrument of an international organization, the reservation requires the acceptance of the competent organ of that organization, unless the treaty otherwise provides.

4. In cases not falling under the preceding paragraphs of this article:

(a) Acceptance by another contracting State of the reservation constitutes the reserving State a party to the treaty in relation to that State if or when the treaty is in force;

(b) An objection by another contracting State to a reservation precludes the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is expressed by the objecting State;

(c) An act expressing the State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

Article 18. Procedure regarding reservations

1. A reservation, an express acceptance of a reservation, and an objection to a reservation must be formulated in writing and communicated to the other States entitled to become parties to the treaty.

2. If formulated on the occasion of the adoption of the text or upon signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An objection to the reservation made previously to its confirmation does not itself require confirmation.

Article 19. Legal effects of reservations

1. A reservation established with regard to another party in accordance with articles 16, 17 and 18:

(a) Modifies for the reserving State the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) Modifies those provisions to the same extent for such other party in its relations with the reserving State.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

3. When a State objecting to a reservation agrees to consider the treaty as in force between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

Article 20. Withdrawal of reservations

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides or it is otherwise agreed, the withdrawal becomes operative only when notice of it has been received by the other contracting States.

13. Convention on the Law of Treaties signed on 23 May 1969 in Vienna. (UN Doc. A/CONF.39/27. UN Conference on the Law of Treaties. Official Records. Documents of the Conference (A/CONF.39/11 Add. 2) United Nations New York 1971, pp. 289–301.)

ARTICLE 2

Use of terms

1. For the purpose of the present Convention:

(d) "reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State;

Section 2. Reservations

ARTICLE 19

Formulation of reservations

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) the reservation is prohibited by the treaty;

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

ARTICLE 20

Acceptance of and objection to reservations

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.

2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

(a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;

(b) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State;

(c) an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

ARTICLE 21

Legal effects of reservations and of objections to reservations

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:

(a) modifies for the reserving State in its relations with that other party to provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) modifies those provisions to the same ex-

tent for that other party in its relations with the reserving State.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

ARTICLE 22

Withdrawal of reservations and of objections to reservations

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

3. Unless the treaty otherwise provides, or it is otherwise agreed:

(a) the withdrawal of a reservation becomes operative in relation to another contracting State only when notice of it has been received by that State;

(b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State which formulated the reservation.

ARTICLE 23

Procedure regarding reservations

1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty.

2. If formulated when signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

14. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide. Advisory Opinion of 25 May 1951, ICJ Reports 1951 (Reservations case).

On November 16th, 1950, the General Assembly of the United Nations adopted the following resolution:

I. Requests the International Court of Justice to give an Advisory Opinion on the following questions:

In so far as concerns the Convention on the Prevention and Punishment of the Crime of Genocide in the event of a State ratifying or acceding to the Convention subject to a reservation made either on ratification or on accession, or on signature followed by ratification:

- I. Can the reserving State be regarded as being a party to the Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention but not by others?
- II. If the answer to Question I is in the affirmative, what is the effect of the reservation as between the reserving State and:
 - (a) The parties which object to the reservation?
 - (b) Those which accept it?
- III. What would be the legal effect as regards the answer to Question I if an objection to a reservation is made:
 - (a) By a signatory which has not yet ratified?
 - (b) By a State entitled to sign or accede but which has not yet done so?

THE COURT IS OF OPINION

In so far as concerns the Convention on the Prevention and Punishment of the Crime of Genocide, in the event of a State ratifying or acceding to the Convention subject to a reservation made either on ratification or on accession, or on signature followed by ratification.

On Question I:

by seven votes to five,
that a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise, that State cannot be regarded as being a party to the Convention.

On Question II:

by seven votes to five,
(a) that if a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, it can in fact consider that the reserving State is not a party to the Convention;
(b) that if, on the other hand, a party accepts the reservation as being compatible with the object and purpose of the Convention, it can in fact consider that the reserving State is a party to the Convention;

On Question III:

by seven votes to five,
(a) that an objection to a reservation made by a signatory State which has not yet ratified the Convention can have the legal effect indicated in the reply to Question I only upon ratification. Until that moment it merely serves as a notice to the other State of the eventual attitude of the signatory State;
(b) that an objection to a reservation made by a State which is entitled to sign or accede but which has not yet done so, is without legal effect.

15. UN General Assembly Resolution 598(VI) of 12 January 1952. (In United Nations Resolutions, ed. Dusan J. Djonovich, Series I, Resolutions adopted by the General Assembly, Vol. III, 1950–52, pp. 32 and 248.)

**598 (VI). RESERVATIONS TO
MULTILATERAL CONVENTIONS**

The General Assembly,

Bearing in mind the provisions of its resolutions 478 (V) of 16 November 1950, which (1) requested the International Court of Justice to give an advisory opinion regarding reservations to the Convention on the Prevention and Punishment of the Crime of Genocide and (2) invited the International Law Commission to study the question of reservations to multilateral conventions,

Noting the Court's advisory opinion of 28 May 1951 and the Commission's report, both rendered pursuant to the said resolution.

1. *Recommends* that organs of the United Nations, specialized agencies and States should, in the course of preparing multilateral conventions, consider the insertion therein of provisions relating to the admissibility or non-admissibility of reservations and to the effect to be attributed to them;

2. *Recommends* to all States that they be guided in regard to the Convention on the Prevention and Punishment of the Crime of Genocide by the advisory opinion of the International Court of Justice of 28 May 1951;

3. *Requests* the Secretary-General:

(a) In relation to reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, to conform his practice to the advisory opinion of the Court of 28 May 1951;

(b) In respect of future conventions concluded under the auspices of the United Nations of which he is the depositary:

(i) To continue to act as depositary in connexion with the deposit of documents containing reservations or objections, without passing upon the legal effect of such documents; and

(ii) To communicate the text of such documents relating to reservations or objections to all States concerned, leaving it to each State to draw legal consequences from such communications.

*360th plenary meeting,
12 January 1952.*

16. UN General Assembly Resolution 1452(XIV) of 7 December 1959. (See United Nations Resolutions, ed. Dusan J. Djonovich, Series I, Resolutions adopted by the General Assembly, Vol. VII, 1958-60, pp. 28 and 232.)

1452 (XIV). RESERVATIONS TO MULTILATERAL CONVENTIONS: THE CONVENTION ON THE INTER-GOVERNMENTAL MARITIME CONSULTATIVE ORGANIZATION

A

The General Assembly,

Having considered the item entitled "Reservations to multilateral conventions: the Convention on the Inter-Governmental Maritime Consultative Organization", as well as India's instrument of acceptance of the Convention on the Inter-Governmental Maritime Consultative Organization and the report of the Secretary-General,

Noting that the Secretary-General of the United Nations acts as the depositary authority in respect of that Convention,

Noting the statement made on behalf of India at the 614th meeting of the Sixth Committee on 19 October 1959, explaining that the Indian declaration was a declaration of policy and that it does not constitute a reservation,

1. *Expresses its appreciation* of the information and materials made available to the General Assembly;

2. *Expresses the hope* that, in the light of the above-mentioned statement of India, an appropriate solution may be reached in the Inter-Governmental Maritime Consultative Organization at an early date to regularize the position of India;

3. *Requests* the Secretary-General to transmit to the Inter-Governmental Maritime Consultative Organization the present resolution together with the relevant records and documentation.

*847th plenary meeting,
7 December 1959.*

17. Draft of the International Commission of American Jurists, Rio de Janeiro, 1927. (In UN Doc. A/CN.4/23: First Report by J.L. Brierly on the Law of Treaties, ILCYB 1950: II, p. 248.)

DRAFT OF THE INTERNATIONAL COMMISSION OF AMERICAN JURISTS, RIO DE JANEIRO, 1927

Article 6

Ratification must be unconditional and must embrace the entire treaty. It must be dispatched in writing in conformity with the constitution of the State.

In case the ratifying State makes reservations in the treaty, it shall become effective when the other contracting party, informed of the reservations, expressly accepts them.

In international conventions celebrated between different States, a reservation made by one of them in the act of ratification affects only the clause in question and the State to which it refers.

18. Convention on Treaties signed in Habana on 20 February 1928. (OAS Law and Treaty Series No. 3: Treaties and Conventions signed at the 6th International Conference of American States, Habana, Cuba, January 16 - February 20, 1928. Pan American Union, Washington D.C., 1950, p. 21ff.)

ARTICLE 6. Ratification must be unconditional and must embrace the entire treaty. It must be made in writing pursuant to the legislation of the State.

In case the ratifying State makes reservations to the treaty it shall become effective when the other contracting party informed of the reservations expressly accepts them, or having failed to reject them formally, should perform action implying its acceptance.

In international treaties celebrated between different States, a reservation made by one of them in the act of ratification affects only the application of the clause in question in the relation of the other contracting States with the State making the reservation.

ARTICLE 7. Refusal to ratify or the formulation of a reservation are acts inherent in national sovereignty and as such constitute the exercise of a right which violates no international stipulation or good form. In case of refusal it shall be communicated to the other contracting parties.

19. Rules adopted by the Governing Body of the Pan American Union on the Procedure to be followed in the Deposit of Ratifications. Resolution of 4 May 1932. (See ICJ Pleadings, p. 16 or ILCYB 1956: II, p. 250.)

The procedure to be followed by the Pan American Union with respect to the deposit of ratifications, pursuant to article 7 of the Convention on the Pan American Union, signed at the Sixth International Conference of American States, shall be the following, unless provisions of a particular treaty provide otherwise:

1. To assume the custody of the original instrument.
2. To furnish copies thereof to all the signatory Governments.
3. To receive the instruments of ratification of the signatory States, including the reservations.
4. To communicate the deposit of ratifications to the other signatory States, and, in the case of reservation, to inform them thereof.
5. To receive the replies of the other signatory States as to whether or not they accept the reservations.
6. To inform all the States signatory to the treaty, if the reservations have or have not been accepted.

With respect to the legal status of treaties to which reservations are made but not accepted, the Governing Board of the Union understands that:

1. The treaty shall be in force, in the form in which it was signed, as between those countries which ratify it without reservations, in the terms in which it was originally drafted and signed;

2. It shall be in force as between the Governments which ratify it with reservations and the signatory States which accept the reservations in the form in which the treaty may be modified by said reservations;

3. It shall not be in force between a Government which may have ratified with reservations and another which may have already ratified, and which does not accept such reservations.

The procedure suggested by the Committee is purely provisional, inasmuch as, strictly speaking, the function of depositary of the instruments of ratification to be performed by the Pan American Union for the first time by virtue of the treaties signed at Havana is also provisional, as long as those treaties have not been unanimously ratified.

In other respects, the points involved in this procedure are very complex, and touch on a problem of international law still much debated, which the Committee believes should be solved in a final manner by the Seventh International Conference of American States and not be a simple interpretative provision of the Governing Board of the Pan American Union.

The Committee consequently considers it advisable, without prejudice to these provisional rules, that this matter should be submitted to the Seventh International Conference of American States and also brought to the attention of the American Institute of International Law.

Felipe A. ESPIL
Ambassador of Argentina
Miguel CRUCHAGA
Ambassador of Chile
Fabio LOZANO
Minister of Colombia

20. Rules on the Ratification of Treaties approved by the Governing Board of the Pan American Union on 2 May 1934. (See ILCYB 1956: II, p. 250.)

Annex III

RULES ON THE RATIFICATION OF TREATIES
APPROVED BY THE GOVERNING BODY OF THE
PAN AMERICAN UNION ON 2 MAY 1934

The following measures would be conducive to giving practical effect to the desire repeatedly expressed by the International Conferences of American States, as set forth in the above-mentioned resolutions:

1. Once treaties or conventions have been signed, the Government of the country in which the conference is held should remit to each of the signatory States, as soon as possible

after the adjournment of the conference, a certified copy of each of the treaties and conventions signed at the conference.

2. The signatory Governments should be urged, in so far as constitutional provisions may permit, to submit the treaties and conventions to their respective Congresses at the first opportunity following the receipt of the certified copies mentioned in the preceding paragraph.

3. The Pan American Union shall transmit, every six months, through the members of the Governing Board, a chart showing the status of the ratifications, reservations, adherences, accessions and denunciations of treaties and conventions signed at conferences held by country members of the Union.

4. The Pan American Union shall address a communication to each of the American Governments requesting that, in accordance with resolution LVII of 23 December 1933 of the Seventh International Conference of American States, and with the sole purpose of studying the possibility of finding a formula acceptable to the majority of the countries members of the Union, the respective Government make known the objections which it may have to the conventions open to its signature or awaiting ratification by its national Congress.

The communications, while recognizing the right of each State to decide in accordance with its interests the question of the ratification of treaties and conventions signed at the international conferences of American States, shall furthermore request each Government to communicate to the Pan American Union the modifications which in its judgement will make ratification possible.

5. The communication addressed to the American Governments in accordance with the preceding paragraphs shall be sent once a year, an endeavour being made to send it at the time of the regular session of the respective Congress.

21. Methods of Preparation of Multilateral Treaties. Final Act of the 8th International Conference of American States held at Lima, Peru, Resolution XXIX approved on 23 December 1938, para. 2. (ICJ Pleadings, p. 18 or ILCYB 1951: II, p. 127.)

In the event of adherence or ratification with reservations, the adhering or ratifying State shall transmit to the Pan American Union, prior to the deposit of the respective instrument, the text of the reservation which it proposes to

formulate, so that the Pan American Union may inform the signatory States thereof and ascertain whether they accept it or not. The State which proposes to adhere to or ratify the treaty, may do it or not, taking into account the observations which may be made with regard to its reservations by the signatory States.

22. (Co-operation of the International Law Commission with Other Bodies, UN Doc. A/CN.4/124, ILCYB 1960: II, p. 133.) Resolution X of the Inter-American Council of Jurists, adopted on 8 September 1959 in Santiago, Chile (Normas relativas a la formulaci3n de reservas a los tratados multilaterales (OEA undecima conferencia interamericana, Quito, Ecuador 1960 (OEA/Ser.E/XI.1) Doc. 11, Union panamericana, Washington D.C. 1959 (Normas))).

“The Inter-American Council of Jurists

“RESOLVES:

“To recommend to the Eleventh Inter-American Conference the consideration of the following rules on reservations to multilateral treaties:

“In the performance of its functions under article 83(e) of the Charter of the Organization of American States, the Pan American Union shall be governed by the following rules, subject to contrary stipulations, with respect to reservations to multilateral treaties, including those open for signature for a fixed or indefinite period.

“1. In the case of ratification or adherence with reservations, the ratifying or adhering State shall send to the Pan American Union, before depositing the instrument of ratification or adherence, the text of the reservations it proposes to make, so that the Pan American Union may transmit them to the other signatory States for the purpose of ascertaining whether they accept them or not.

“The Secretary-General shall inform the State that made the reservations of the observations made by the other States. The State in question may or may not proceed to deposit the instrument of ratification or adherence with the reservations, taking into account the nature of the observations made thereon by the other signatory States.

“If a period of one year has elapsed from the date of consultation made to a signatory State without receiving a reply, it shall be understood that that State has no objection to make to the reservations.

"If, notwithstanding the observations that have been made, the State maintains its reservations, the juridical consequences of such ratification or adherence shall be the following:

"(a) As between States that have ratified without reservations, the treaty shall be in force in the form in which the original text was drafted and signed.

"(b) As between the States that have ratified with reservations and those that have ratified and accepted such reservations, the treaty shall be in force in the form in which it was modified by the said reservations.

"(c) As between the States that have ratified with reservations and those that have ratified but have not accepted the reservations, the treaty shall not be in force. In any event the State that rejects the reservations and the one that has made them may expressly agree that the treaty shall be in force between them with the exception of the provisions affected by the reservations.

"(d) In no case shall reservations accepted by the majority of the States have any effect with respect to a State that has rejected them.

"II. Reservations made to a treaty at the time of signature shall have no effect if they are not reiterated before depositing the instrument of ratification.

"In the event the reservations are affirmed, consultations will be made in accordance with rule I.

"III. Any State may withdraw its reservations at any time, either before or after they have been accepted by other States. A State that has rejected a reservation may later accept it.

"The making of reservations to a treaty at the time of signature by the plenipotentiaries, of ratification, or of adherence is an act inherent in national sovereignty.

"Acceptance or rejection of reservations made by other States or abstention from doing so is also an act inherent in national sovereignty. It is recommended that reservations made to multilateral treaties, at the time of signing, ratification, or adherence to them, shall be precise and shall indicate exactly the clause or rule to which the reservation is made."

23. **Standards on Reservations to Inter-American Multilateral Treaties (AG/RES. 102(III-0/73)). Resolution adopted at the 12th Plenary Session on 14 April 1973. (OAS General Assembly, Proceedings Vol. 1. OEA/Ser.P/III-0.2, 15 April 1973).**

A. Formulation of reservations to Inter-American multilateral treaties

1. States may make reservations at the time of signing, ratifying, or adhering to a treaty, unless the treaty does not permit them or contains special provisions on reservations.

2. Reservations to a treaty have no effect whatever if the reserving State does not reiterate them at the time of depositing its instrument of ratification or adherence.

3. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.

4. When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

5. When a treaty is a constituent instrument of an inter-American organization and, unless it provided otherwise, a reservation requires the acceptance of the competent organ of that organization.

6. When a State proposes to deposit with the General Secretariat of the Organization of American States an instrument of ratification or of adherence to a treaty with reservations, whether it has made them at the time of signing the treaty or not, it shall send the text of the reservations to the General Secretariat prior to the deposit of the instrument, so that the Secretariat may carry out the consultation provided for in paragraphs 3 and 4 of section D of these standards.

7. If the contracting States, that the General Secretariat has consulted on the text of the reservations have not formulated objections within one year after the date of the communication from the General Secretariat, they shall be considered to have accepted the reservations. As to the other States the General Secretariat has notified, each such State shall be considered to have accepted the reservations on the date on which it deposits its instrument of ratification or of adherence to the treaty unless it formulates objections.

B. Withdrawal of reservations

1. States may withdraw their reservations at any time, whether before or after the other States have accepted or objected to them. Likewise, States that have objected to reservations may later accept them.

2. Unless the treaty otherwise provides, or it is otherwise agreed:

a. the withdrawal of a reservation becomes operative in relation to another contracting State only when notice of it has been received by that State;

b. the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State that formulated the reservation.

C. Legal effects of the acceptance or nonacceptance of reservations

1. Between States that have deposited their respective instruments of ratification or adherence without reservations, the treaty shall be in force in the form in which the original text has been signed.

2. Between States that have deposited their respective instruments of ratification or adherence with reservations and the contracting States that have accepted such reservations, the treaty shall be in force in the form in which it was modified by the said reservations; and

3. As between a reserving State and a State that has objected to its reservations, the treaty shall be in force, unless the objecting State unequivocally states its intention to the contrary. If the objecting State does not oppose the treaty's being in force, the provisions affected by the reservation shall be inapplicable between the two States to the extent determined by the reservation.

D. Standards for the General Secretariat as depositary of Inter-American multilateral treaties

The General Secretariat in the performance of its functions as depositary of Inter-American multilateral treaties in accordance with Article 118.f of the Charter of the Organization shall, except when the treaty concerned provides otherwise, observe the following standards:

1. Assume custody of the original treaty and of the full powers;

2. Furnish certified copies of the treaty to all member States of the OAS, whether signatories of the treaty or not, and to nonmember States that have signed it or adhered to it or that express an intention to adhere to the treaty;

3. Transmit to all States referred to in the preceding subparagraph the text of the reservations that have been transmitted by each other

State in accordance with Section A.6 of these standards, and consult the contracting States as to whether they object to the reservations or not;

4. Receive the replies from the contracting States and transmit them to the reserving States and to the other States referred to in paragraph 2 of this section;

5. Receive and maintain custody of the instruments of ratification and adherence, including reservations;

6. Notify the States referred to in paragraph 2 of this section of the deposit of such instruments and transmit the text of any reservations;

7. Examine whether the signature or any instrument, notification, or communication relating to the treaty is in due and proper form and, if need be, bring the matter to the attention of the State concerned;

8. In the event of any difference appearing between a State and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of the signatory States and the contracting States or, where appropriate, of the competent organ of the Inter-American organization concerned; and

9. Register the treaty with the Secretariat of the United Nations.

Final provisions

1. These standards on the formulation of reservations Inter-American multilateral treaties shall apply to the reservations sent to the General Secretariat after the date on which these standards are approved.

2. The standards to be observed by the General Secretariat pursuant to section D, in the performance of its duties as depositary of Inter-American multilateral treaties, shall not apply to any action that has already been taken by the General Secretariat.

24. Resolution of the Inter-American Juridical Committee on Standards on Reservations to Inter-American Treaties. CJI/RES-II-12/1985.

Resolution of the Inter-American Juridical Committee on Standards for the General Secretariat as Depositary of Inter-American Treaties.
CJI/RES-II-14/1985.

RESOLUTION

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING:

That, at its Third Regular Session, the Gen-

eral Assembly approved the resolution entitled "Standards on Reservations to Inter-American Multilateral Treaties" [AG/RES. 102 (III-0/73)];

That the aforementioned standards established a system very similar to that of the United Nations Convention on the Law of Treaties signed in Vienna in 1969;

That, nevertheless, those standards differ somewhat from those in the above-mentioned Convention, and that the existence of such differences, the usefulness of which has not been proven by experience, has created doubts regarding their interpretation;

That, with reference to the functions of the General Secretariat of the Organization of American States as depositary, it is advisable, in connection with the system of reservations, to adopt the provisions that are in force in the United Nations.

RESOLVES:

To submit the following draft resolution to the General Assembly of the Organization of American States for consideration:

THE GENERAL ASSEMBLY,

CONSIDERING

That, at its Third Regular Session, it approved the resolution entitled "Standards on Reservations to Inter-American Multilateral Treaties" [AG/RES. 102 (III-0/73)];

That, on the basis of experience acquired since the aforementioned resolution went into force, it is advisable to introduce certain modifications in order to improve it;

That the Inter-American Juridical Committee has submitted draft amendments to those standards,

RESOLVES:

To approve the following:

STANDARDS ON RESERVATIONS TO INTER-AMERICAN TREATIES

I. *Formulation of Reservations*

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

- a) the reservation is prohibited by the treaty;
- b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- c) in cases not falling under subpara-

graphs a) and b), the reservation is incompatible with the object and purpose of the treaty.

II. *Acceptance of and objection to reservations*

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.
2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.
3. When a treaty is a constituent instrument of an Inter-American organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.
4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:
 - a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;
 - b) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State;
 - c) an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.
5. For the purpose of paragraphs 2 and 4 unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

III. *Legal effects of reservations and of objections to reservations*

1. A reservation established with regard to another party in accordance with Standards I, II and V:
 - a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and
 - b) modifies those provisions to the same extent for that other party in its relations with the reserving State.
2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.
3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation related do not apply as between the two States to the extent of the reservation.

IV. *Withdrawal of reservations and of objections to reservations*

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.
2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.
3. Unless the treaty otherwise provides, or it is otherwise agreed:
 - a) the withdrawal of a reservation becomes operative in relation to another contracting State only when notice of it has been received by that State;
 - b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State which formulated the reservation.

V. *Procedure regarding reservations*

1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty.
2. If formulated when signing the treaty subject to ratification, accep-

tance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.
4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.
- VI. The provisions of a treaty regulating reservations apply from the time of the adoption of its text.
- VII. The General Secretariat of the Organization of American States shall perform its functions as depositary of documents that contain reservations or objections without expressing its opinion on their legal effects, and shall communicate their texts to all the States concerned, allowing the latter to infer the legal consequences of such communications.

Rio de Janeiro, 19 August 1985

25. **Advisory Opinion of the Inter-American Court of Human Rights on the Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (Articles 74 and 75). I-A. Court H.R. Advisory Opinion No. OC-2/82 of 24 September 1982.**

8. The Commission submitted the following question to the Court:

From what moment is a State deemed to have become a party to the American Convention on Human Rights when it ratifies or adheres to the Convention with one or more reservations: from the date of the deposit of instrument of ratification or adherence or upon the termination of the period specified in Article 20 of the Vienna Convention on the Law of Treaties?

With regard to the interpretation of Articles 74 of 75 of the American Convention on Human Rights concerning the effective date of the entry into force of the Convention in relation to a State which ratifies or adheres to it with one or more reservations,

THE COURT IS OF THE OPINION

By unanimous vote, that the Convention enters into force for a State which ratifies or adheres to it with or without a reservation on the date of the deposit of its instrument of ratification or adherence.

26. Model Final Clauses of Agreements or Conventions approved by the Ministers' Deputies at their 113th Meeting. Annex I (article (e). Annex II article (d). Strasbourg 1963).

Article (e)

1. Any Contracting Party may, at the time of signature or when depositing its instrument of ratification, acceptance or accession, declare that it avails itself of one or more of the reservations provided for in the Annex⁽¹⁾ to this Agreement.

2. Any Contracting Party may wholly or partly withdraw a reservation it has made in accordance with the foregoing paragraph by means of a declaration addressed to the Secretary-General of the Council of Europe, which shall become effective as from the date of its receipt.

3. A Contracting Party which has made a reservation in respect of any provision of this Agreement may not claim the application of that provision by any other Party; it may, however, if its reservation is partial or conditional, claim the application of that provision in so far as it has itself accepted it.

(1) The Annex might be worded as follows:

"Any Contracting Party may declare that it reserves the right:

1. to
2. to"

27. Model Final Clauses for Conventions concluded within the Council of Europe – Conclusions of the 315th Meeting of the Ministers Deputies held in Strasbourg from 18 to 21 February 1980. (Council of Europe – Committee of Ministers (CM/Del/Concl(80)315). Appendix III, article (e) (1).)

Article (e) (1)

1. Any State may, at the time of signature or when depositing its instrument of ratification,

acceptance, approval or accession, declare that it avails itself of one or more of the reservations provided for in the Annex (2) to [this Agreement] [this Convention]. No other reservation may be made (3).

2. Any Contracting State which has made a reservation under the preceding paragraph may wholly or partly withdraw it by means of a notification addressed to the Secretary General of the Council of Europe. The withdrawal shall take effect on the date of receipt of such notification by the Secretary General.

3. A Party which has made a reservation in respect of any provision of [this Agreement] [this Convention] may not claim the application of that provision by any other Party; it may, however, if its reservation is partial or conditional, claim the application of that provision in so far as it has itself accepted it.

(1) Where a treaty contains no reservation clause, any reservation compatible with the object and purpose of the treaty may be formulated. If such is not the intention of the bodies responsible for drawing up the treaty, who might on the contrary wish that no reservations be made, an article such as the following should be adopted:
"No reservation may be made in respect of the provisions [of this Agreement] [of this Convention]."

Article (e) above is only one example among others of various possible arrangements for the formulation of reservations, as already provided for in several Council of Europe Agreements or Conventions.

The sentence "No other reservation may be made" is intended to make it clear that the list of authorized reservations is exclusive. This sentence might, however, be deleted in appropriate cases.

(2) The Annex might be worded as follows:

"Annex
(Article (e))

Any State may declare that it reserves the right:

1. to
2. to"

(3) If formulated when signing the treaty, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

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